CLERK'S COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946

No. 540

NELSON FOSTER AND GEORGE PAYNE,
PETITIONERS,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

PETITION FOR CERTIORARI FILED SEPTEMBER 26, 1946.

CERTIORARI GRANTED FEBRUARY 3, 1947.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 540

NELSON FOSTER AND GEORGE PAYNE,
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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

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[fol. 1] [Caption omitted]

[fols. 2-3] **IN SUPREME COURT OF ILLINOIS**

No. 29382

PEOPLE STATE OF ILLINOIS, Defendant in Error,

vs.

NELSON FOSTER and GEORGE PAYNE, alias ELIJAH JEFFERSON, Plaintiffs in Error

Error to Circuit Court, Pulaski County.

ORDER GRANTING LEAVE TO PROCEED IN FORMA PAUPERIS—January 23, 1946

And now on this day the Court having duly considered the motion for leave to sue out a writ of error as a poor person, and being now fully advised in the premises,

Leave is granted to file petition for writ of error as a poor person without the payment of costs. Petitioner is ruled to file record, abstracts and briefs on or before twenty (20) days before the first day of the next term. Leave is also granted to file eight typewritten copies of abstract and brief.

[fol. 4] IN CIRCUIT COURT OF PULASKI COUNTY

INDICTMENT—BURGLARY AND LARCENY—Filed February 22, 1935

No. 29382

STATE OF ILLINOIS,
Pulaski County, ss:

Of the January Term of the Pulaski County Circuit Court, in the year of our Lord One Thousand Nine Hundred and thirty-five.

The Grand Jurors, chosen, selected and sworn in and for the County of Pulaski in the name and by the authority of the People of the State of Illinois, upon their oaths present:

That Nelson Foster, George Payne alias Elijah Jefferson and Alex Thames, late of said County, on the 14th day of February in the year of our Lord One Thousand Nine Hundred and thirty-five at and within the said County of Pulaski and State aforesaid, the dwelling house of J. V. Shaver there situate, willfully, maliciously, forcibly, feloniously and burglariously did break and enter with intent, the goods and chattels of the said J. V. Shaver in said dwelling house then and there being found, feloniously to take, steal and carry away, and Five Dollars ($5.00) lawful money of the United States of America of the goods and chattels of the said J. V. Shaver in said dwelling house then and there being found, did feloniously take, steal and carry away, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the same People of the State of Illinois.

And the Grand Jurors aforesaid, in the name and by the authority aforesaid, upon their oaths aforesaid, do further present that the said Nelson Foster, George Payne alias Elijah Jefferson and Alex Thames, late of said County, on the 14th day of February in the year of our Lord One Thousand Nine Hundred and thirty-five at and within the said County of Pulaski and State aforesaid, the dwelling house of one J. V. Shaver there situate, willfully, maliciously, burglariously, feloniously, and without force, the doors and windows thereof being open, did enter, with intent the goods and chattels of the said J. V. Shaver in said dwelling house then and there being found, feloniously to take, steal and carry away, and Five Dollars lawful money of the United States of America, of the goods and chattels of the said J. V. Shaver in said dwelling house then and there being found, did feloniously take, steal and carry away, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the same People of the State of Illinois.

Joseph O'Sullivan, State's Attorney in and for said County of Pulaski.

[fol. 5] [Endorsed:] No. —. Pulaski County, Circuit Court. January Term, 1935. The People of the State of Illinois vs. Nelson Foster, George Payne alias Elijah Jefferson and Alex Thames. Indictment for Burglary and Larceny. A True Bill. John McNeil, Foreman of the Grand Jury. Witnesses. J. E. Wilson, C. G. McIntire, J.

V. Shaver, Mrs. J. V. Shaver, Nellie Whernberg, Addie Parker, Ralph Wilson, Joe Wallace, Otis Mackins, Hoot Thornton, D. Winchester, Otis Nutt, Ollie Brown, Otis Cherry, Walter Mackins, Mrs. Walter Mackins, Mrs. Lipe, C. A. Bolar. Filed this 22nd day of February 1935. Dorothy Bankson Moore, Clerk.

[fol. 6] IN CIRCUIT COURT OF PULASKI COUNTY

MINUTES FROM THE JUDGES DOCKET IN THE CASE OF

THE PEOPLE OF THE STATE OF ILLINOIS

VS.

NELSON FOSTER, GEORGE PAYNE alias Elijah Jefferson and ALEX THAMES

Burglary and Larceny

Feb. 22, 1935,—The Defendants Nelson Foster and George Payne, alias Elijah Jefferson and Alex Thames, having been furnished with a copy of the Indictment and a list of the Jurors and Peoples Witnesses and are advised of their rights of Trial and of the consequences of an entry of a plea of guilty and being arraigned in open Court for plea to the Indictment says, each for himself That he is guilty of burglary and larceny as charged in the indictment and thereupon the Court advises and admonishes each of said defendants of the consequences of entering such pleas of guilty, and Thereafter each of said defendants still persist in such pleas of guilty, and Thereafter each of said defendants still presist in such pleas of guilty, Whereupon said pleas of guilty are received and entered of record.

The Court finds the ages of said defendants to be as follows, respectively, Nelson Foster 34 years old, George Payne, alias Elijah Jefferson 48 years, Alex Thames, 21 years old.

It is the Judgment and sentence of the Court upon said pleas of guilty that each of said defendants, Nelson Foster, George Payne, alias Elijah Jefferson and Alex Thames, be forthwith committed to The Illinois State Penitentiary and there confined until released in due course of law, said im-

prisonment to be for a period of not less than one year and may extend to life time, and that they pay the cost of this suit.

[fol. 7] IN CIRCUIT COURT OF PULASKI COUNTY

Burglary and Larceny No. 1531

THE PEOPLE OF THE STATE OF ILLINOIS

vs.

NELSON FOSTER, GEORGE PAYNE alias Elijah Jefferson and ALEX THAMES

MITTUMUS

On this 22nd day of February A. D. 1935 come the People of the State of Illinois by Joseph O'Sullivan, State's Attorney. Also come Nelson Foster, George Payne, alias Elijah Jefferson and Alex Thames, defendants herein, into open Court in their own proper person, Defendants and each of them, furnished with a copy of the indictment, list of jurors, and a list of witnesses for the People, and each of said defendants is duly arraigned in open Court. Each defendant informs the Court he desires to enter a plea of guilty to the charge of burglary and larceny as charged in the indictment. The Court instructs said defendants and each of them of their rights and admonishes them to the consequences of their plea, yet they presist in said plea, whereupon the Court receives said plea of guilty, and same entered. The Court finds the age of the defendant Nelson Foster to be thirty-four (34) years; the age of the defendant George Payne, alias Elijah Jefferson, to be forty-eight (48) years, the age of the defendant Alex Thames to be Twenty-one (21) years.

It is therefore the judgment and sentence of this Court, upon said plea of guilty, that the defendants Nelson Foster, George Payne, alias Elijah Jefferson, and Alex Thames, be taken from the bar of this Court to the common jail of Pulaski County and from thence by the Sheriff of said Pulaski County to the Illinois State Penitentiary and be delivered to the Warden or Keeper of said Penitentiary, and said Warden or Keeper is hereby required and com-

manded to take the body of the said Nelson Foster, and the body of the said George Payne, alias Enijah Jefferson, and the body of Alex Thames, and keep them, and each of them in said Penitentiary in safe and secure custody from and after the delivery thereof until discharged by due operation of law, said imprisonment to be not less than one year and may extend to life.

It is further ordered that said defendants pay the cost of this suit.

Feb. 22nd.

[fols. 8-9] Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 10-17] IN THE SUPREME COURT OF ILLINOIS, THE MARCH TERM, A. D. 1946

No. 29382

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,

vs.

NELSON FOSTER & GEORGE PAYNE alias ELIJAH JEFFERSON, Plaintiff in Error

Error to the Criminal Court of Pulaski County

Hon. H. A. Spann, Trial Judge.

ABSTRACT OF THE RECORD—Filed February 7, 1946

Nelson Foster & George Payne, Pro Se.

* * * * * * *

[fol. 18] ERRORS RELIED UPON FOR REVERSAL AND DISCHARGE

In the prosecution of this writ of error the petitioners allege that:

I

That they did not have counsel to represent and protect their rights. That they were on trial in a state court upon a serious criminal charge and were unable to defend themselves. And that they must be allowed benefit of counsel

every step of the way. (Article II Bill of Rights Paragraph 2 and Paragraph 9. Also the 6th and 14th Amendments of the United States Constitution.)

II

That it is a denial of a fair trial to force them to trial with such expedition as to deprive them of the effective aid and assistance of counsel. (Article II Bill of Rights Paragraph 9 and the 6th and 14th Amendments of the U. S. Constitution.)

III

That the Court did not explain to them the aggravation and mitigation nor did the Court examine witnesses as the Court did possess discretion as to the extent of the punishment but failed according to the law to carry out its duty, therefore the Court erred from its procedure.

IV

The Court exceeded the limit of its jurisdiction, though the original jurisdiction was lawful, yet, when the Court with such expedition, gave them an arraignment, pleas of guilty entered, passing judgment and sending them to the penitentiary in less than ten minutes causes the Court to lose its jurisdiction and the judgment is void.

V

The processes were defective, as the law plainly states that the defendants did not have choice of an attorney, they [fol. 19] did not have reasonable time and full opportunity to prepare their defense and that right is guaranteed them under the Bill of Rights of the Illinois Constitution and the 6th and 14th Amendments of the U. S. Constitution.

VI

Foster and Payne were deprived of life, liberty without due process of law.

VII

Foster and Payne did not have a copy of the accusation, did not have a right to meet the witnesses face to face; nor did they sign any statements or waive their rights at any time, therefore, the Court erred in passing judgment and the judgment is void.

VIII

That the Court erred because the trial was not in accordance with the recognized rules of law and procedure; and to be represented by counsel is not an idle ceremony but a substantial part of the law of the land guaranteed by the Illinois and the U. S. Constitution.

IX

The Court erred when it refused to allow Foster and Payne to ask for information as to what procedure they should take before being sentenced, after the Court had stated that they understood that Foster and Payne was to plead guilty. However, the Court would not advise and did not explain to them and would not allow them to talk, in fact the judge passed sentence and the Sheriff had them on their way to the County jail in less than ten minutes. This is err- on the Court and grounds for reversal and discharge. (Bill of Rights of the Illinois Constitution and the United States Constitution 6th and 14th Amendments expresses in no uncertain terms that this is unlawful and in err-.

[fols. 20-64]

X

Foster and Payne *was* arraigned and before this arraignment the State's Attorney told them that they would receive one year in the penitentiary and then be paroled. That they would not need counsel, that it was up to them to plead guilty, say nothing and that he would see that they were given one year and then released on parole. The State's Attorney must not promise nor must he do anything that is not so stated in the statutes. Neither shall the judge hold a hearing that is not guided by the laws. Foster and Payne have been in the penitentiary for more than ten years for a crime of stealing $5.00 under the charge of burglary and larceny and the facts show that they were denied every right so given them by the Constitution of the United States and the Bill of Rights of the Illinois Constitution. When this is so their judgment is void and they must be discharged.

[fols. 65-66] IN SUPREME COURT OF ILLINOIS

No. 29382

PEOPLE STATE OF ILLINOIS, Defendant in Error,

vs.

NELSON FOSTER and GEORGE PAYNE, alias Elijah Jefferson, Plaintiffs in Error

Error to Circuit Court Pulaski County

ORDER OF SUBMISSION—March 18, 1946

Now on this day come the parties hereto and this being one of the days set apart for the call of the docket under the rules of this Court, and it appearing to the Court that plaintiffs in error hath filed herein a duly certified transcript of the record and proceedings of the Court below, together with printed abstracts thereof, and briefs and arguments of counsel in support of the errors assigned herein, and entered motion to reverse the judgment and remand said cause and for costs, and the said defendant in error having entered motion to affirm said judgment and for costs and procedendo, and said motions being taken under advisement for final hearing, and the Clerk of this Court reporting that said cause is now ready to be taken, and said cause is here submitted for the consideration and judgment of the Court:

Therefore it is ordered by the Court that this cause be and the same is hereby taken under advisement.

[fol. 67] IN SUPREME COURT OF ILLINOIS

Docket No. 29382—Agenda 9—March, 1946

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,

v.

NELSON FOSTER et al., Plaintiffs in Error

OPINION—Filed May 21, 1946

MR. CHIEF JUSTICE THOMPSON delivered the opinion of the court:

An indictment was returned in the circuit court of Pulaski county at the January term, 1935, against plaintiffs in error, Nelson Foster, and George Payne, *alias* Elijah Jefferson,

and Alex Thames, charging them with the crimes of burglary and larceny. They entered pleas of guilty and were sentenced to imprisonment in the penitentiary for a term of from one year to life.

The record discloses that plaintiffs in error, on February 22, 1935, appeared in open court, were furnished with a copy of the indictment, a list of the jurors and the People's witnesses, and after being advised of their rights to trial and of the consequences of their pleas, they persisted therein and entered pleas of guilty. Plaintiffs in error, Nelson Foster and George Payne, impleaded with Alex Thames, have since been confined in the penitentiary, and, appearing *pro sese*, they bring this cause here on the common-law record.

The errors assigned by which a reversal of the judgment is sought are: (1) That they did not have counsel to represent and protect their rights; (2) that the court did not examine witnesses in aggravation and mitigation of the offense; (3) that the court exceeded the limit of its jurisdiction in passing the judgment and sentencing them to the penitentiary in less than ten minutes; (4) that they did not have reasonable time and full opportunity to prepare their defense; (5) that they were not furnished with a copy of the indictment and did not have a chance to meet the witnesses face to face; (6) that the State's Attorney secured their pleas of guilty by promises of leniency in their sentence; and, (7) that they were denied due process of law.

It is first contended by plaintiffs in error that they did not have counsel appointed to represent and protect their rights. It is not shown by the record that the defendants informed the court or in any way indicated that they desired counsel. We have repeatedly held that the right to be represented by counsel is a personal right which a defendant may waive or claim as he himself may determine. (*People* v. *Fuhs*, 390 Ill. 67.) This contention is without merit.

[fols. 68-69] It is next contended that the court did not examine witnesses in aggravation or mitigation of the offense. Plaintiffs in error did not request the court to hear evidence in aggravation or mitigation of the offense, and, further, as the statute fixes the penalty and there is no discretion upon the pleas of guilty of plaintiffs in error but to impose sentences of from one year to life,

the court was not required to hear evidence in aggravation or mitigation of the offense. *People* v. *Stack*, 391 Ill. 15.

It is further contended the court exceeded the limit of its jurisdiction in entering the judgment and sentencing plaintiffs in error to the penitentiary in less than ten minutes. The record reveals they were advised of their rights and persisted in their pleas and there is nothing therein to indicate there was any abuse of discretion in their being immediately sentenced to the penitentiary on their pleas.

Plaintiffs in error further contend they did not have reasonable time and full opportunity to prepare their defense. Nothing appears in the common-law record to so indicate and we do not have a bill of exceptions.

Plaintiffs in error urge they were not furnished with a copy of the indictment and did not have a chance to meet the witnesses face to face. The record specifically shows they were furnished with a copy of the indictment, and, obviously, their insistence in pleading guilty did not necessitate meeting the witnesses face to face.

Plaintiffs in error further urge that the State's Attorney made promises to them in order to secure their pleas of guilty. No bill of exceptions has been filed in this case and we cannot consider questions of fact arising *de hors* the record. (*People* v. *Johns*, 388 Ill. 212; *People* v. *Lantz*, 387 Ill. 72.) Their contention in this respect cannot be sustained.

It is last urged by plaintiffs in error that they were denied due process of law. Nothing appears in the common-law record to indicate that they did not have the fair trial which the law contemplates. This cause being here on the common-law record, the extent of our inquiry is circumscribed by what that record contains. *People* v. *Conn*, 391 Ill. 190; *People* v. *Street*, 353 Ill. 60.

We have examined the record in this case and the numerous contentions assigned by plaintiffs in error and we do not find any errors warranting a reversal. For the foregoing reasons, the judgment of the circuit court of Pulaski county as to plaintiffs in error, Nelson Foster and George Payne, is affirmed.

Judgment affirmed.

[fols. 70-71] IN SUPREME COURT OF ILLINOIS

No. 29382

PEOPLE STATE OF ILLINOIS, Defendant in Error,

vs.

NELSON FOSTER and GEORGE PAYNE, alias ELIJAH JEFFERSON, Plaintiffs in Error

Error to Circuit Court, Pulaski County, 1531

ORDER OF AFFIRMANCE—May 21, 1946

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the judgment aforesaid, is there anything erroneous, vicious or defective, and in that record there is no error.

Therefore, it is considered by the Court that the judgment of the circuit court of Pulaski County aforesaid, be affirmed in all things and stand in full force and effect, notwithstanding the said matter and things therein assigned for error.

I, Earle Benjamin Searcy, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

[fol. 72] IN THE SUPREME COURT OF ILLINOIS, THE SEPTEMBER TERM, A. D. 1946

No. 29382

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,

vs.

NELSON FOSTER & GEORGE PAYNE alias ELIJAH JEFFERSON, Plaintiffs in Error

Writ of Error to Criminal Court of Pulaski County

Hon. H. A. Spann, Trial Judge.

PETITION FOR REHEARING—Filed June 7, 1946

Nelson Foster, George Payne, Menard, Illinois, Pro Sese.

[fol. 73] May it Please the Court:

Nelson Foster & George Payne, Alias Elijah Jefferson, Plaintiffs in Error, asks this Court for a rehearing, and states that the Court in its opinion overlooked or ignored the Plaintiffs in Error's fundamental right to legal representation in a criminal case, especially in a case where a life sentence was imposed, which is guaranteed to him by section 1 of the Fourteenth Amendment to the Constitution of the United States, and, also the Constitution of the State of Illinois, Bill of Rights, Section II, paragraphs 2 and 9.

Plaintiffs in Error further asks a rehearing because this Court, in its opinion affirmed the said case on May 21st, 1946 by such action by stating that Plaintiffs in Error [fol. 74] waived all his constitutional rights.

This case was brought to the Court solely upon the record of the Common Law and it is apparent that from this certified Common Law there is no mention of the Plaintiffs in Error waiving his rights. The record in fact is barren.

In Hill v. State of Texas, 316 U. S. 400, 406, 62 S. Ct. 1159, 1162, the Supreme Court of the United States said:

> "No state is at liberty to impose upon one charged with crime a discrimination in its trial procedure which the Constitution, and an Act passed pursuant to the Constitution, alike forbid. Nor is this Court at liberty to

grant or withhold the benefits of equal protection, which the Constitution commands for all * * * But it is our duty as well as the State's to see to it that through out the procedure for bringing him to justice he shall enjoy the protection which the Constitution guarantees."

The one point plaintiffs in error wishes to bring out is: It is a settled fact that the record in this case fails to show a compliance not only with the Fourteenth Amendment to the Constitution of the United States, but also with the provisions of the Illinois Constitution guaranteeing every defendant in a criminal case due process of law.

In Johnson v. Zerost, 304 U. S. 457, and also in the case of Glasser v. U. S., 315 U. S. 60, regarding the waiver of constitutional rights and the record showing that such rights were waived, defendant in error states that there "is not any pretense that there was any waiver here of any constitutional rights", and he then proceeds to say that when a person pleads guilty he automatically waives all rights. Therefore the Johnson and Glasser cases show that unless the record shows an intentional waiver of constitutional [fol. 75] rights, it will be presumed that such rights were not waived (and this common law record shows no waiver of any constitutional rights to counsel of Plaintiffs in error).

If the Plaintiffs in error *has* previously had their day in the trial court. If a trial Court can legally through its procedure bring before the bar a person, charged with burglary and larceny and without showing in the record if the person wants counsel, without asking them to sign a waiver and pass sentence on that person without any further ado according to the laws of the Illinois Constitution and the United States Constitution, Amendment 14, then there is no recourse for plaintiffs in error.

This Court, if they will look at the indictment in this case they will see that the Judge of the trial court could have sentenced them on any part of the indictment, that is on any one of the counts and still be within the law. It must be noted that the second count and charge of larceny could have been not less than one year nor more than ten years as prescribed by the statutes. That, and that was the reason why the plaintiffs in error were willing to plead guilty. But at that, the Court should have the plaintiffs in error sign waivers on their constitutional rights. Not just say

that because the record is barren of any mention of their constitutional rights they have automatically waived each and every one of their rights.

There is no use to citing numerous cases where criminals have had their cases reversed on the very grounds the plaintiffs now brings to this Honorable Court's attention, but referring to: Duties of State's Attorneys-Smith Hurd Ill. R. S., Chapter 14, Sec. 5. States Attorneys are representative of all people including the defendant, and his official oath requires him to safeguard constitutional rights [fol. 76] of defendant in criminal cases as those of any other citizen. (People v. Sweetin, 325, Ill. 245.)

If from this law, it must be assumed that the State Attorney did not protect the plaintiffs in error. It is an evident that this is reversible error.

From the foregoing it is to be observed that it is extremely doubtful whether the defendants, now plaintiffs enjoyed due process of law under the Illinois Constitution. The question also is raised as to due process of law under the const-ution of the United States. The decisions of the Supreme Court of the United States go further in rendering effective a defendant's rights, under circumstances as disclosed here, than do those of Illinois. No State has a right to regulate the procedure its takes that is contrary to the State's own constitution and the United States Constitution. Under Federal decisions it is held that there is a presumption against waiver of constitutional rights, and that an intentional waiver of constitutional rights should properly appear of record.

In summing up, when an indictment for a criminal offense that has a life sentence is returned on a certain day, the defendants called, before the court, a hearing that last probably ten or fifteen minutes and they are then on their way to the penitentiary for life without signing any waivers, without having counsel, without being advised by the States Attorney, as well as the Court what they could do, comes within the points that the 14th Amendment of the United States Constitution which involves that person's constitutional rights. So the conclusion is that this Honorable Court has overlooked plaintiffs in error rights and that the record being barren in this case fails to show that plaintiffs in error *has* waive- their constitutional rights as set forth in the fourteenth amendment to the constitu- [fol. 77] tion of the United States, but also with the pro-

vision of the Illinois constitution guaranteeing every defendant in a criminal case due process of law.

For the reasons above given it is respectfully submitted that the petition for rehearing should be allowed, and on a rehearing the opinion of May 21, 1946 be reversed and plaintiffs in error remanded back to Pulaski Circuit Court.

Respectfully submitted, (S.) Nelson Foster, George Payne, Menard, Illinois, Pro Sese—.

[fol. 78] IN SUPREME COURT OF ILLINOIS

No. 29382

PEOPLE STATE OF ILLINOIS, Defendant in Error,

vs.

NELSON FOSTER and GEORGE PAYNE, alias Elijah Jefferson, Plaintiffs in Error

Error to Circuit Court, Pulaski County

ORDER DENYING REHEARING—September 12, 1946

And now on this day the Court having duly considered the petition for rehearing herein and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies a rehearing.

[fol. 79] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 80] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1946

No. 540

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS—February 3, 1947

On Consideration of the motion for leave to proceed *in forma pauperis* in this case.

It Is Ordered by this Court that the said motion be, and the same is hereby, granted.

[fol. 81] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1946

No. 540

ORDER ALLOWING CERTIORARI—Filed February 3, 1947

The petition herein for a writ of certiorari to the Supreme Court of the State of Illinois is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: Enter petitioners pro se. In forma pauperis. File No. 51,404 Illinois, Supreme Court. Term No. 540. Nelson Foster and George Payne, Petitioners, vs. The People of the State of Illinois. Petition for a writ of certiorari and exhibit thereto. Filed September 26, 1946. Term No. 540, O. T. 1946.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 540

NELSON FOSTER AND GEORGE PAYNE,
Petitioners,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

BRIEF FOR PETITIONERS.

CHARLES R. KAUFMAN,
Counsel for Petitioners.

POPE & BALLARD,
Chicago, Illinois,
Of Counsel.

April 15, 1947.

Scheffer Printing Company, Del. 7171

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 540

NELSON FOSTER AND GEORGE PAYNE,
Petitioners,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

BRIEF FOR THE PETITIONERS.

This case is before the Court on writ of certiorari granted February 3, 1947 (R. 16), to review a decision of the Supreme Court of Illinois (R. 8) affirming a judgment of the Circuit Court of Pulaski County, Illinois, entered February 22, 1935, sentencing the petitioners to imprisonment for one year to life on their plea of guilty to the crimes of burglary and larceny (R. 3-4).

Opinion Below.

The opinion of the Supreme Court of Illinois (R. 8-10) is reported at 394 Ill. 194, 68 N.E. 2d 252.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code (28 U.S.C. § 344) providing for review by certiorari of a final judgment of the highest court of a state in any cause in which a right is claimed under the Constitution of the United States.

The decision of the Supreme Court of Illinois was filed on May 21, 1946 (R. 8-11), and a petition for rehearing was denied on September 12, 1946. Orders granting petitioners' motion for leave to proceed in *forma pauperis* and allowing certiorari were entered by this Court on February 3, 1947.

Constitutional Provision Involved.

Section 1 of the Fourteenth Amendment to the Constitution provides, so far as is material here:

> "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law * * *"

Question Presented.

Petitioners were indicted for the serious crimes of burglary and larceny, handed a copy of the indictment, and arraigned. In order intelligently to plead, it would have been necessary for petitioners to analyze the legalistic verbiage of the indictment, to understand the applicable Illinois statutes and decisions, and to know the practice of accepting pleas of guilty to lesser offenses (such as larceny which carried a maximum penalty of one year) as a trade for dismissing more serious charges such as burglary (the mandatory sentence for which was one year to life). Notwithstanding their special need of counsel under these circumstances, on the same day the indictment was handed down petitioners were arraigned, their pleas of guilty were accepted, and they were sentenced for one year

to life. At no time were they offered counsel or advised of their right to counsel, or did they receive any assistance from counsel.

The question is whether under these circumstances the failure of the trial court to advise petitioners of their right to counsel or to offer counsel constituted a denial of due process of law in contravention of the Fourteenth Amendment.

Statement of the Case.

On February 22, 1935, each petitioner was indicted for both burglary and larceny. The indictments were printed forms consisting of two paragraphs not designated as counts or otherwise identified (Original Record, p. 4). The first paragraph of the indictment charged the burglarious breaking and entry of a dwelling house and the larceny of $5 worth of property from it; the second paragraph charged the burglarious entry of the same dwelling house without breaking and larceny of $5 worth of property from it.*

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* Close reading by one familiar with criminal law is necessary to distinguish the two paragraphs; they are identical with the exception of certain words of art in the middle of each paragraph. The first paragraph uses the words:

> "willfully, maliciously, forcibly, feloniously and burglariously did break and enter with intent, the goods * * * feloniously to take, steal and carry away, and * * * the goods * * * did feloniously take, steal and carry away,"

while the second paragraph states:

> "willfully, maliciously, burglariously, feloniously, and without force, the doors and windows thereof being open, did enter, with intent the goods * * * feloniously to take, steal and carry away, and * * * the goods * * * did feloniously take, steal and carry away."

Petitioners were arraigned the same day, pleaded guilty, and within a few minutes were given sentences of one year to life (the mandatory sentence for burglary*) which, under Illinois law, is a life sentence.** They were still confined at the penitentiary at the time of the filing of the petition for certiorari.

The minutes from the Judge's Docket as to the court proceedings (R. 3-4) are as follows:

> "Feb. 22, 1935, — The defendants Nelson Foster and George Payne, alias Elijah Jefferson and Alex Thames, having been furnished with a copy of the Indictment and a list of the Jurors and Peoples Witnesses and are advised of their rights of Trial and of the consequences of an entry of a plea of guilty and being arraigned in open Court for plea to the Indictment says, each for himself that he is guilty of burglary and larceny as charged in the indictment and thereupon the Court advises and admonishes each of said defendants of the consequences of entering such pleas of guilty and Thereafter each of said defendants still persist in such pleas of guilty, and Thereafter each of said defendants still presist in such pleas of guilty, Whereupon said pleas of guilty are received and entered of record.
>
> "The Court finds the ages of said defendants to be as follows, respectively, Nelson Foster 34 years old, George Payne, alias Elijah Jefferson 48 years, Alex Thames, 21 years old.
>
> "It is the Judgment and sentence of the Court upon said pleas of guilty that each of said defendants, Nelson Foster, George Payne, alias Elijah Jefferson and Alex Thames, be forthwith committed to The Illinois State Penitentiary and there confined until released in due course of law, said imprisonment to be for a

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* Ill. Rev. Stat. (1935), Chapter 38, par. 65; (1945), Chap. 38, par. 84.

** See, e. g., **People v. Peters**, 246 Ill. 351, 92 N. E. 889 (1910); **People v. Wilson**, 391 Ill. 463, 63 N. E. (2d) 488 (1945); **People v. Tyson**, 393 Ill. 108, 110, 65 N. E. (2d) 796, 797 (1946).

period of not less than one year and may extend to life time, and that they pay the cost of this suit."

On January 23, 1946, the Supreme Court of Illinois granted petitioners' motion for leave to sue out a writ of error as a poor person (R. 1). On February 7, 1946, petitioners filed with said court an Abstract of Record and a Statement and Argument, the latter reciting errors relied upon (R. 5-7). Among these were the denial of their rights under the Fourteenth Amendment by reason of their being hurried through trial on a serious criminal charge without assistance of counsel or the offer thereof, despite their inability to defend themselves.

On May 21, 1946, the Supreme Court of Illinois handed down an opinion and decision affirming the judgment of the Circuit Court of Pulaski County. The court considered the contentions as to right to counsel and undue expedition of trial on the merits. Although petitioners had based their argument that their conviction was illegal primarily upon the Fourteenth Amendment to the Federal Constitution (see Statement, Brief and Argument in behalf of plaintiffs in error, Original Record, p. 22 *et seq.*, omitted in printing), the opinion referred solely to Illinois cases. The court apparently believed that if the Illinois rule as to counsel was satisfied, this automatically met the requirements of the due process clause. The court concluded that there was no error or abuse of discretion under the Illinois authorities and affirmed the judgment (R. 9-10, quoted *infra*, p. 11).*

* Petitioners had also alleged that before arraignment they were told by the State's Attorney that they did not need counsel and would be sentenced merely to one year in the penitentiary and would then be released on parole (R. 7). The Illinois Court refused to consider this matter as the charge was not supported by any fact appearing in the common law record (R. 10). This is the Illinois rule on consideration of writs of error. **People v. Carter**, 391 Ill. 594, 63 N. E. 2d 763 (1945), aff'd **sub. nom Carter v. Illinois**, 329 U. S. 173 (1946). The mittimus is not part of the common law record under this rule. **People v. Valentino**, 354 Ill. 584, 188 N. E. 825 (1933); **People v. Wells**, 393 Ill. 626, 66 N. E. 2nd 866 (1946).

On June 7, 1946, petitioners filed a petition for rehearing (R. 12-15), again alleging that they had not waived any constitutional rights and relying upon the Fourteenth Amendment and cases in this Court arising thereunder. The Supreme Court of Illinois denied the petition for rehearing on September 12, 1946 without opinion (R. 15).

Petitioners filed a petition for writ of certiorari in this Court on September 26, 1946 (R. 16). On February 3, 1947, this Court granted petitioners' motion for leave to proceed in *forma pauperis* and allowed the writ of certiorari (R. 15, 16). The undersigned was appointed counsel for petitioners on March 10, 1947.

Summary of Argument.

The record shows that petitioners, on trial for serious crimes, were not given any assistance from counsel, offered the assistance of counsel, or even advised of their right to the assistance of counsel. This resulted from the Illinois rule that accused must request counsel and state under oath their inability to procure counsel, a rule strikingly at variance with the requirements of due process established by recent decisions of this Court. Despite their need of counsel because of the difficult and complex questions involved—questions the existence of which petitioners could not have suspected, much less been able to decide—they were hurried to trial, their pleas of guilty were accepted and they were sentenced to the penitentiary.

Under these circumstances, petitioners were plainly deprived of their fundamental right to counsel guaranteed by the Fourteenth Amendment to the Constitution as an integral part of due process of law. In recent years this Court has defined the particular applications of the con-

stitutional rule pertaining to the facts at bar, and reversed convictions on substantially identical records. The two Federal cases relied on by Respondent are not in point. *Carter* v. *Illinois* * was decided on a question of waiver of right to counsel, and there is no waiver here. *Betts* v. *Brady* ** is also distinguishable on its facts, and to the extent inconsistent with the decisions on which petitioners rely, has been overruled.

Petitioners' conviction was therefore void and the decision of the Supreme Court of Illinois should be reversed.

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* 329 U. S. 173 (1946).

** 316 U. S. 455 (1942).

Argument.

I.

THE PETITIONERS WERE NOT ADVISED OF THEIR RIGHT TO COUNSEL, DID NOT WAIVE THIS RIGHT, AND DESPITE THEIR SPECIAL NEED FOR ADVICE OF COUNSEL BECAUSE OF THE DIFFICULT LEGAL QUESTIONS INVOLVED, THEIR CONVICTION AND SENTENCING WERE HURRIED THROUGH WITHOUT ANY ASSISTANCE OF COUNSEL.

Petitioners were indicted on February 22, 1935. On the same day they were arraigned, furnished a copy of the indictment, advised merely of their right of trial, pleaded guilty, and were sentenced, all without the assistance of counsel, the offer of counsel, or even any advice that they were entitled to counsel.

A. THE COURT DID NOT ADVISE PETITIONERS OF THEIR RIGHT TO COUNSEL OR OFFER THEM THE ASSISTANCE OF COUNSEL, NOR DID THEY RECEIVE ANY ASSISTANCE FROM COUNSEL.

These facts sharply differentiate this case from *Carter* v. *Illinois*, 329 U. S. 173 (1946), in which a majority of five Justices found that the defendant was advised of his right to counsel and waived that right. The minutes of the trial judge in the *Carter* case stated (329 U. S. 177) that:

> "• • • The Court fully explained to the defendant • • • all his rights in the premises, *including the right to have a lawyer appointed by the Court to defend him* and also • • • his right to trial."

The minutes of the trial judge in this case (R. 3) state only that petitioners

> "• • • were advised of their rights of Trial and of the consequences of an entry of a plea of guilty • • •"

Nor is the reason for the difference far to seek. *Carter* v. *Illinois, supra*, was a capital case. Although the Illinois Constitution provides that "• • • In all criminal prosecu-

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• Emphasis is supplied throughout this brief unless otherwise noted.

tions the accused shall have the right to defend in person and by counsel * * *" (Ill. Constitution, Art. II, § 9), this provision has been construed merely as entitling the defendants to be represented by counsel, and the Illinois rule is that the right to have counsel appointed by the court is entirely dependent upon statute. *The People* v. *Corbett*, 387 Ill. 41, 43, 55 N.E. 2nd 74, 75 (1944).

The Illinois statute provides that:

> "Whenever it shall appear to the court that a defendant or defendants indicted in a capital case, is or are indigent and unable to pay counsel for his or her defense, it shall be the duty of the court to appoint one or more competent counsel for said defendant or defendants, who shall receive a reasonable sum for services * * *."
>
> Ill. Rev. Stat. (1935), Chap. 38, par. 754; (1945), Chap. 38, par. 730.

Consequently, in a capital case such as the *Carter* case the judge is apparently under an affirmative duty, once it appears that defendants are indigent, to offer to appoint counsel for them.*

In a non-capital case such as this, however, the following portion of the Illinois statutes applies:

> "* * * Every person charged with crime shall be allowed counsel, and when he shall state upon oath that he is unable to procure counsel, the court shall assign him competent counsel, who shall conduct his defense."
>
> Ill. Rev. Stat. (1935), Chap. 38, par. 754; (1945), Chap. 38, par. 730.

And the Illinois Supreme Court has consistently construed this provision as necessitating the appointment of counsel only when a defendant (a) requests counsel and (b) states under oath that he cannot procure counsel.

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*But cf. **People v. Bernovich**, 391 Ill. 141, 143, 62 N.E. 2nd 691 (1945).

In *People* v. *Lavendowski*, 326 Ill. 173, 176, 157 N.E. 193, 194 (1927), the court stated the Illinois rule as follows:

> "The constitutional provision that a person charged with crime shall have the right to appear and defend by counsel, and the provision of the statute that he shall be allowed counsel or the same shall be appointed for him upon his statement, under oath, that he cannot procure such assistance, *does not place upon the court the duty to proffer the services of counsel,* • • •"

Thus in *People* v. *Corrie*, 387 Ill. 587, 589, 56 N.E. 2nd 767, 769 (1944), the court made clear that the Illinois rule does not necessitate advising defendants of their right to counsel, stating:

> "Claiming an infringement of his constitutional rights, defendant insists that the court erred in receiving and entering his plea of guilty without first advising him of his right to legal counsel and in failing to appoint counsel for him. • • • No duty rests upon the trial court to provide counsel for a defendant unless he states, upon oath, that he is unable to procure counsel. (*People* v. *Corbett*, *ante*, p. 41; *People* v. *Childers*, 386 Ill. 312; *People* v. *Lavendowski*, 326 Ill. 173; *People* v. *Kawoleski*, 310 Ill. 498.)"

See also *People* v. *Fuhs*, 390 Ill. 67, 68, 60 N.E. 2d 205, 206 (1945).

In fact, the Illinois rule is that the defendants are deemed to have waived their right to counsel unless they expressly claim said right and state under oath their inability to procure counsel. Thus in *People* v. *Stubblefield*, 391 Ill. 609, 610, 63 N.E. 2nd 762, 763, the court said:

> "Plaintiff in error also contends that his constitutional rights were violated by failing to provide him with assistance of counsel. The right to be represented by counsel is one which the accused may claim or waive, as he chooses. No duty rests upon the court to provide counsel for the accused unless the latter states on oath his inability to procure counsel and expresses his desire to have such appointed."

These and similar statements have consistently been quoted, cited and applied. See, *e.g.*, *People* v. *Kawoleski*, 310 Ill. 498, 500, 142 N.E. 169, 170 (1923); *People* v. *Childers*, 386 Ill. 312, 314, 53 N.E. 2d 878, 879 (1944); *The People* v. *Corbett, supra*, 387 Ill. 41, 55 N.E. 2nd 74 (1944); *People* v. *Pond*, 390 Ill. 237, 61 N.E. 2nd 37 (1945); *People* v. *Batey*, 392 Ill. 390, 64 N.E. 2nd 875 (1946).

The opinion of the Supreme Court of Illinois in this case makes clear that petitioners were denied relief on the basis of these rules. The court stated (R. 9):

> "It is first contended by plaintiffs in error that they did not have counsel appointed to represent and protect their rights. It is not shown by the record that the defendants informed the court or in any way indicated that they desired counsel. We have repeatedly held that the right to be represented by counsel is a personal right which a defendant may waive or claim as he himself may determine. (*People* v. *Fuhs*, 390 Ill. 67). This contention is without merit."

The Supreme Court of Illinois considered the above and the fact that petitioners were hurried through to conviction in less than ten minutes, but found nothing therein to indicate that petitioners did not have the "fair trial" guaranteed by due process of law (R. 10).

The summary common law record in this case must be viewed in the light of the Illinois rule. So interpreted, it is clear that petitioners were not advised of their right to counsel or offered the assistance of counsel at any time during the proceedings. And even the presumption that the trial judge discharged his duty in which the Illinois Supreme Court indulges (*People* v. *Corbett*, 387 Ill. 41, 43, 55 N.E. 2nd 74, 75 (1944); *People* v. *Fuhs, supra*, 390 Ill. 67, 68, 60 N.E. 2nd 205, 206 (1945)), does not suggest the

contrary. Conceding *arguendo* the validity of such a presumption,* it implies merely that the *Illinois rule* was not violated, i. e., that the fact that counsel was not appointed for petitioners infers that they did not request such appointment and state under oath their inability to procure counsel. By no stretch of the imagination can it be implied that the requirements of the Fourteenth Amendment to the Constitution, as interpreted by this Court—requirements which the Illinois courts have signally failed to note—were complied with.

B. PETITIONERS WERE RUSHED THROUGH TRIAL ON SERIOUS OFFENSES WITHOUT OPPORTUNITY FOR REFLECTION OR CONSIDERATION.

The record further shows that petitioners were indicted, arraigned and sentenced without opportunity for reflection or consideration of their course of action or the consequences of their pleas of guilty. The indictment was presented on February 22, 1935 (R. 1-3). The judge's minutes (R. 3) show that on the same day petitioners were advised of their right to a trial and the consequences of a plea of guilty, that they pleaded guilty, and were sentenced. The full length of the colloquy could have been only a few minutes. Even if petitioners had been capable of comprehending the situation, there was no time allowed or taken for reflection or consideration. Plainly, they received short shrift. And it is noteworthy that their charge that the entire proceedings occupied but ten minutes (Application for writ of error, Pars. IV and IX, R. 6-7) has nowhere been denied. See briefs of State of Illinois to Illinois Supreme Court, Original Record, page 39, omitted in printing, and in opposition to certiorari. On the con-

* Compare **Ball v. United States**, 140 U. S. 118 (1891), and **Lewis v. United States**, 146 U. S. 370, 373 (1892), holding that the fact of presence of the accused during his trial must be affirmatively shown and cannot be presumed.

trary, the Supreme Court of Illinois accepted this allegation as a fact (R. 10), apparently viewed the question as solely one of the trial court's discretion, and found no abuse thereof.

C. UNDER THE CIRCUMSTANCES OF THIS CASE THE ASSISTANCE OF COUNSEL WAS ESSENTIAL FOR A FAIR TRIAL.

Petitioners were obviously in need of counsel and incapable of performing the formidable task of defending themselves. The indictment handed them is couched in legal phraseology bewildering and confusing to a layman. A single printed page form (Original Record, p. 4) combines two paragraphs, each of which charges both burglary and larceny. The typed-in material—the factual data—is the same in both; the distinction lies in the print. The first paragraph charges that petitioners "willfully, maliciously, forcibly, feloniously and burglariously did * * * enter"; the second that petitioners "willfully, maliciously, burglariously and without force, the doors and windows thereof being open, did enter with intent the goods and chattels * * * there being found, feloniously to take, steal and carry away." Both paragraphs further charge that the petitioners "did feloniously take, steal and carry away" goods and chattels of the value of $5.00, constituting larceny. The use of two paragraphs and the combination in each of both burglary and larceny is confusing even to an attorney. A defendant unversed in the law and under the strain of accusation of a serious crime could by a swift glance not even perceive, much less understand, the difference between the four charges.*

* Petitioners claim that at the time of their indictment and conviction they were unable to read or write. (Brief in Support of Petition for Writ of Certiorari, p. 8.) The documents they filed **pro se** evidence their inability to analyze legal verbiage or to cope with close and complex legal questions.

And even intelligent reading of the indictment would have left the petitioners far from equipped to determine their proper course. Under Illinois law, burglary consists of either a forcible breaking or entering, or an entry without force but with intent to commit a felony or larceny.* Larceny is the felonious stealing or taking away of the personal goods of another, including "private stealing • • • from a house in the day time."** Burglary and larceny are two separate and distinct crimes of which larceny is the lesser. *Yoe, Impl'd* v. *People*, 49 Ill. 410 (1868).

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* The statute reads:

"Whoever wilfully and maliciously and forcibly breaks and enters, or wilfully and maliciously, without force (the doors or windows being open), enters into any dwelling-house, kitchen, office, shop, store-house, warehouse, malt-house, stilling-house, mill, pottery, factory, wharfboat, steamboat, or other water craft, freight or passenger railroad car, church, meeting house, school-house, or other building, with intent to commit murder, robbery, rape, mayhem, or other felony or larceny shall be deemed guilty of burglary and be imprisoned in the penitentiary for any term of years not less than one year or for life."

Ill. Rev. Stat. (1935) Chap. 38, par. 65; (1945) Chap. 38, par. 84.

** The statute reads:

"Larceny is the felonious stealing, taking and carrying, leading, riding or driving away the personal goods of another.. Larceny shall embrace every theft which deprives another of his money or other personal property, or those means or muniments by which the right and title to property, real or personal, may be ascertained. Private stealing from the person of another, and from a house in the day time, shall be deemed larceny. Larceny may also be committed by feloniously taking and carrying away any bond, bill, note, receipt or any instrument of writing of value to the owner."

Ill. Rev. Stat. (1935) Chap. 38, par. 380; (1945) Chap. 38, par. 387.

Where a defendant is on trial for both offenses, the jury must determine which has been established. *Ruth* v. *The People*, 99 Ill. 185 (1881); *Love* v. *People*, 160 Ill. 501, 43 N.E. 710 (1896). The distinction depends on intent at the time of entry and illegal intent sufficient to constitute burglary cannot be inferred from the mere commission of larceny after entry. Thus in *People* v. *Kelly*, 274 Ill. 556, 558, 113 N.E. 926, 927 (1916), the court reversed a conviction for burglary although larceny was proved, stating (p. 558):

> "He may have taken advantage of the opportunity to commit larceny, but his presence in the store is as consistent with his innocence as with his guilt of the criminal intent at the time of his entry. * * * The plaintiff in error cannot be rightfully convicted of burglary merely because he stole while in the store, if he did steal."

For the distinctions between the two crimes, and the necessity of intent, see also. *People* v. *Myler*, 374 Ill. 72, 75, 28 N.E. 2nd 83, 84 (1940), reversing conviction for burglary; *People* v. *Keene*, 391 Ill. 305, 63 N.E. 2nd 509 (1945); cf. *Price* v. *People*, 109 Ill. 109 (1884), conviction for burglary reversed by divided court because of insufficiency of proof of intent.

Thus Appellate Courts have differed with trial judges and members of the Illinois Supreme Court have differed between themselves as to the intent and other elements necessary for conviction of the crime of burglary, and the distinction between that crime and larceny, a distinction which petitioners could in no wise have appreciated. And the difference, important in all cases, was the more so because of the small amount here involved. The indictment charged entry and the taking away of goods of the value

of $5.00. If the entry constituted burglary, the sentence of one year to life imprisonment imposed upon petitioners was mandatory (R. 9-10). Under Illinois law, this is a life sentence. (*Supra*, p. 4.) On the other hand, if larceny alone was involved the maximum sentence was one year in the county jail.* Consequently on the difference between burglary and larceny depended the difference between a maximum term of one year in the county jail and a sentence of one year to life in the penitentiary.

As their application for writ of error states, petitioners were unable to defend themselves (R. 5) and did not obtain information as to the procedure (R. 7). They were confronted with numerous and difficult questions of law: whether their entry was forcible so as to constitute burglary under the first count; whether, although without force, it was with illegal intent as charged under the second count; whether their actions failed to constitute burglary but amounted to larceny; or whether they were guilty of any crime at all.

And there was also a tactical problem of pleading. Conviction for burglary carried a mandatory life sentence;

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* The Illinois statute provides:

"Every person convicted of larceny if the property stolen exceeds the value of fifteen dollars, or if the property is stolen from the person of another, shall be imprisoned in the penitentiary for not less than one, nor more than ten years; if the property stolen has not been stolen from the person of another and is of the value of fifteen dollars, or less, the person convicted shall be confined in the county jail, or sentenced to labor in the workhouse of the county, city, or town, where the conviction is had, or on the streets or alleys of the city, or on the public roads in the county, or to such labor under the direction of the sheriff as the county board may provide for, not exceeding one year, and fined not exceeding one hundred dollars."

Ill. Rev. Stat. (1935), Chap. 38, par. 382; (1945), Chap. 38, par. 389.

that for larceny of $5 a maximum sentence of one year in the county jail. If a plea of guilty were to be entered, one to the lesser of the two offenses might well have been sufficient. The practice of accepting pleas of guilty to lesser offenses is general throughout the United States and thoroughly ingrained in Illinois procedure. Although no statistics covering the year 1935 have been found, during 1926 66.49 per cent of the 2,823 pleas of guilty entered in the State were to the lesser of two offenses charged.* In 1933 41 per cent of the total of 4,101 indictments presented in Cook County were tried on waivers of the more serious offense.** Under such circumstances and in view of the mandatory sentence upon conviction of burglary, petitioners' pleas of guilty to both the offenses of burglary and larceny alone suffice to evidence their ignorance, inexperience, and inability to defend themselves. They had nothing to gain and everything to lose by this course. ***

The record, therefore, shows the following: Petitioners were indicted for serious offenses. They were furnished a copy of the indictment, a document difficult to the point of being impossible for a layman to understand. Moreover, understanding not only of the indictment but of the intricacies of the Illinois statutes defining burglary and larceny and of the complex questions arising thereunder was necessary for them to determine whether or not they were guilty

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* Illinois Association for Criminal Justice, **Illinois Crime Survey** (1931), p. 82. During 1927 more than one-third of the 1637 inmates of Pontiac Prison had been sentenced on pleas of guilty to the lesser of several offenses charged. **Ibid.** 473.

** Chicago Crime Commission, **Criminal Justice**, May, 1945, p. 13.

*** The pleas are in fact explicable at all only upon the basis charged in their application for writ of error (R. 7), that they had been told by the State's Attorney that they would receive a sentence of one year and be paroled.

of the offenses charged. And, even assuming *arguendo* their guilt, there remained the question whether the prosecution and the court would, in accordance with customary practice, accept a plea of guilty to the lesser of the offenses charged. On all these matters the effective assistance of counsel was necessary for informed and intelligent decision. But petitioners were not offered the assistance of counsel, were not advised of their right to counsel, and were not even given time to reflect before determining their course. They did not even have the chance to waive counsel. Instead they were arraigned before a judge who advised them both of their right to trial and of the consequences of guilty pleas before even requesting them to plead, reiterated this formal notification after they had pleaded guilty, entered the pleas and imposed sentence. The entire proceeding occupied but a few minutes.

So understood, petitioners' situation is identical with those of the defendants whom this Court has held were denied due process of law by reason of failure of the trial court to appoint or offer the assistance of counsel. These decisions are quoted and discussed in Point II, *infra*, and we here state only the epitome of the rule, as phrased by Mr. Justice Reed in *Hawk* v. *Olson*, 326 U. S. 271, 278 (1945):

> "• • • The defendant needs counsel and counsel needs time."

In this case petitioners were afforded neither.

II.

THE FAILURE TO ADVISE PETITIONERS OF THEIR RIGHT TO COUNSEL OR TO OFFER THEM COUNSEL DEPRIVED THEM OF THEIR RIGHT TO A FAIR HEARING GUARANTEED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

A long line of decisions of this Court establishes that the right to counsel in criminal cases in state courts is one of

the "fundamental rights" guaranteed by the due process clause of the Fourteenth Amendment. *Powell* v. *Alabama*, 287 U. S. 45 (1932); *Grosjean* v. *American Press Company*, 297 U. S. 233, 243-244 (1936); *Avery* v. *Alabama*, 308 U. S. 444, 446-447 (1939); *Ex Parte Hawk*, 321 U. S. 114; *Williams* v. *Kaiser*, 323 U. S. 471 (1945); *Tomkins* v. *Missouri*, 323 U. S. 485 (1945); *House* v. *Mayo*, 324 U. S. 42 (1945); *White* v. *Ragen*, 324 U. S. 760 (1945); *Rice* v. *Olson*, 324 U. S. 786 (1945); *Canizio* v. *New York*, 327 U. S. 82 (1946); *Carter* v. *Illinois*, 329 U. S. 173 (1946); *De Meerleer* v. *Michigan*, ... U. S. ....., 67 S. Ct. 596 (1947).* The right has been so accepted that recent decisions of this Court have turned not upon the existence of the right but on subsidiary questions as to whether it has been waived, whether defendants actually received effective assistance of counsel, or whether procedurally the question was properly before this Court. Accordingly we take up first the particular aspects of the constitutional rule here applicable, and next the decisions relied on by Respondent in its opposition to certiorari.

A. THE NECESSITY FOR ASSISTANCE OF COUNSEL EXISTS AT ALL STAGES OF THE PROCEEDING AND IS NOT DISPENSED WITH BY A PLEA OF GUILTY.

In *Williams* v. *Kaiser*, 323 U. S. 471 (1945), this Court held that an accused was deprived of due process of law by his conviction on a plea of guilty in a capital case where he received no assistance from counsel. The following ex-

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* The necessity that accused be afforded counsel as an essential to a fair trial has been recognized by criminologists and textwriters. Glueck, **Crime and Justice** (1936), 241; National Commission on Law Observance and Enforcement, **Report on Lawlessness in Law Enforcement** (1931) 7, 281, 341; Pound, **The Administration of Justice in the Modern City**, 26 Harv. L. Rev. 302, 319 (1913); Arado. **Criminology in Vignette**, Chicago Bar Record, Jan. 1946, page 102.

tract from the opinion is equally applicable to the facts in this case (323 U. S. 474):

"• • • The law of Missouri has important distinctions between robbery in the first degree, robbery in the second degree, grand larceny, and petit larceny. These involve technical requirements of the indictment or information, the kind of evidence required for conviction, the instructions necessary to define the several elements of the crime, and the various defenses which are available. These are a closed book to the average layman. These considerations underscore what was said in *Powell* v. *Alabama, supra,* p. 69: 'Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. *He requires the guiding hand of counsel at every step in the proceedings against him.* Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true it is of the ignorant and illiterate, or those of feeble intellect.' *Those observations are as pertinent in connection with the accused's plea as they are in the conduct of a trial.* The decision to plead guilty is a decision to allow a judgment of conviction to be entered without a hearing—a decision which is irrevocable and which forecloses any possibility of establishing innocence. If we assume that petitioner committed a crime, we cannot know the degree of prejudice which the denial of counsel caused. See *Glasser* v. *United States,* 315 U. S. 60, 75-76. *Only counsel could discern from the facts whether a plea of not guilty to the offense charged or a plea of guilty to a lesser offense would*

be appropriate. A layman is usually no match for the skilled prosecutor whom he confronts in the court room. He needs the aid of counsel lest he be the victim of overzealous prosecutors, of the law's complexity, or of his own ignorance or bewilderment."

See also the companion case of *Tomkins* v. *Missouri,* 323 U. S. 485 (1945).

The same rule has since been applied to non-capital cases, the Court holding that accused were denied due process in their convictions on pleas of guilty without benefit or assistance of counsel, or the offer thereof. See *House* v. *Mayo,* 324 U. S. 42 (1945); *Rice* v. *Olson,* 324 U. S. 786 (1945); *De Meerleer* v. *Michigan,* ..... U. S. ....., 67 S. Ct. 596 (1947); cf. *Canizio* v. *New York,* 327 U. S. 82 (1946).

B. THE ACCUSED MUST BE ADVISED OF HIS CONSTITUTIONAL RIGHT TO COUNSEL, AND A REQUEST FOR COUNSEL IS NOT NECESSARY.

In *Tomkins* v. *Missouri,* 323 U. S. 485 (1945), the Court emphasized that a request for counsel was not necessary to invoke an accused's constitutional right thereto, and that the right was not waived by failure to request counsel, stating (p. 487):

"*Powell* v. *Alabama,* 287 U. S. 45, 71, held that at least in capital cases 'where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeblemindedness, illiteracy, or the like, *it is the duty of the Court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law'. Under that test, a request for counsel is not necessary.* • • •

"The nature of the charge emphasizes the need for counsel. Under Missouri law, one charged with murder in the first degree may be found guilty of that offense, of murder in the second degree, or of manslaughter. • • • The punishments for the offenses are

different. * * * The differences between them are governed by rules of construction meaningful to those trained in the law, but unknown to the average layman. The defenses cover a wide range. And the ingredients of the crime of murder in the first degree as distinguished from the lesser offenses are not simple but ones over which skilled judges and practitioners have disagreements. *The guiding hand of counsel is needed* lest the unwary concede that which only bewilderment or ignorance could justify or pay a penalty which is greater than the law of the State exacts for the offense which they in fact and in law committed."

In *Rice* v. *Olson*, 324 U. S. 786 (1945), the Court had before it a habeas corpus petition alleging that the petitioner, convicted of burglary, a non-capital offense,* upon a plea of guilty, had been deprived of due process of law through the trial court's failure to advise him of his constitutional right to counsel or to provide counsel for him. The writ had been denied by the Nebraska Supreme Court on the basis of a state rule identical in substance with that applied by the Supreme Court of Illinois in this case, that a waiver of constitutional right was implied from the accused's failure to request that counsel be assigned to him, particularly where a guilty plea was entered. *Rice* v. *Olson*, 144 Neb. 547, 14 N.W. 2nd 850, 852 (1944). This Court held the Nebraska rule violative of the Fourteenth Amendment, stating (324 U. S. 788-789):

"* * * *A defendant who pleads guilty is entitled to the benefit of counsel, and a request for counsel is not necessary.* It is enough that a defendant charged with an offense of this character is incapable adequately of making his defense, that he is unable to get counsel, and that he does not intelligently and understandingly waive counsel."

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* Neb. Rev. Stat. (1943), Sec. 28-532 to 537.

Canizio v. *New York*, 327 U. S. 82 (1946), came before the Court on a motion to vacate a sentence for robbery (a non-capital offense*) on the ground that the defendant was deprived of due process by reason of his conviction without representation by counsel and without advice from the court of his right to counsel or assignment of counsel to assist him. The majority of the Court affirmed the conviction on the ground that "petitioner actually had the benefit of counsel" (327 U. S. 82), but made clear that, absent this fact, the failure of the trial court to advise the accused of his right to counsel would have denied due process, stating (327 U. S. 85):

> "Before we consider this question we shall assume that petitioner was without counsel when arraigned and when he pleaded guilty and that although he was unfamiliar with his legal rights the court failed to inform him of his right to counsel. Consequently, had there been nothing to contradict petitioner's general allegation that he was not represented by counsel in the interim between his plea of guilty and the time he was sentenced, his charges would have been such as to have required the court to hold a hearing on his motion. *Rice* v. *Olson*, 324 U. S. 786."

See also *White* v. *Ragen*, 324 U. S. 760 (1945).

The most recent decision of this Court on the question, *De Meerleer* v. *Michigan*, ... U. S. ....., 67 S. Ct. 596 (1947), involved facts parallel to those in this case. The defendant, then 17 years old, was arraigned, tried, convicted of murder (a non-capital offense in Michigan**) and sentenced to life imprisonment in a single day. He was without legal assistance throughout the proceedings and was not advised of his right to counsel. The Supreme Court of Michigan denied relief on the ground that the defend-

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* McKinney's Cons. Laws of N. Y., Vol. 39, Art. 190, Secs. 2120-29.

** Mich. Stat. Ann., 28.548 (Sec. 216).

ant had not requested counsel and was not entitled to counsel as of right, or to be notified of his right to counsel, citing a Michigan rule identical in substance with the Illinois rule applied by the Illinois Supreme Court in this case. See *De Meerleer* v. *Michigan;* 313 Mich. 548, 21 N. W. (2d) 849, 851 (1946).

This Court, in a unanimous *per curiam* opinion, held that the application of the Michigan rule denied the defendant due process, stating (..... U. S. ....., 67 S. Ct. 596, 597):

> "Here a seventeen year old defendant confronted by a serious and complicated criminal charge, was hurried through unfamiliar legal proceedings without a word being said in his defense. At no time was assistance of counsel offered or mentioned to him, nor was he apprised of the consequences of his plea. Under the holdings of this Court, petitioner was deprived of rights essential to a fair hearing under the Federal Constitution. Amend. 14, *Powell* v. *State of Alabama,* 1932, 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158, 84 A.L.R. 527; *Williams* v. *Kaiser,* 1945, 323 U. S. 471, 65 S. Ct. 363, 89 L. Ed. 398; *Tompkins* v. *State of Missouri,* 323 U. S. 485, 65 S. Ct. 370, 89 L. Ed. 407; *White* v. *Ragan,* 1945, 324 U. S. 760, 65 S. Ct. 978, 89 L. Ed. 1348; *Hawk* v. *Olson,* supra. See *Betts* v. *Brady,* 1942, 316 U. S. 455, 62 S. Ct. 1252, 86 L. Ed. 1595."

The principles laid down in the above cases are directly applicable to the facts here, which are in substance identical with those of the prior cases in which this Court has upset similar convictions. We therefore take up next the cases cited by Respondent in opposition to certiorari.

C. THE CASES RELIED ON BY RESPONDENT DO NOT SUPPORT THE DECISION BELOW.

In its brief in opposition to the petition for certiorari Respondent contended that the petitioners received their full rights under the Illinois statute relating to assistance of counsel and the decisions of the Supreme Court of Illinois

interpreting the statute. But the question here is not whether the Illinois rule was applied in accordance with the Illinois decisions, but whether its application in this case contravened the overriding constitutional guarantee of due process of law. Thus in *Williams* v. *Kaiser, supra,* 323 U. S. 471, 473 (1945), the Court stated:

> "• • • But the right to counsel in cases of this type is a right protected by the Fourteenth Amendment of the federal Constitution. The question whether that federal right has been infringed is not foreclosed here, even though the action of the state court was on the ground that its statute requiring the appointment of counsel was not violated. *Powell* v. *Alabama,* 287 U. S. 45, 59-60."

See also *Rice* v. *Olson, supra,* 324 U. S. 786 (1945), and *De Meerleer* v. *Michigan, supra* ..... U. S. ....., 67 S. Ct. 596 (1947), in both of which state court decisions predicated upon compliance with state rules were also reversed for violation of the Fourteenth Amendment. The Illinois cases cited by Respondent are, therefore, wide of the mark, and we turn to a consideration of the only two decisions involving the Fourteenth Amendment cited in opposition to certiorari, *Carter* v. *Illinois, supra,* 329 U. S. 173 (1946), and *Betts* v. *Brady,* 316 U. S. 455 (1941).

In the *Carter* case, as here, the defendant had been convicted following a plea of guilty. However, as stated *supra,* page 8, the record in the *Carter* case included an explicit statement that the defendant had been advised of "all his rights in the premises including the right to have a lawyer appointed by the court to defend him" (329 U. S. 177). A majority of five Justices found in this statement proof that "the accused, with his rights fully explained to him, consciously chose to dispense with counsel" (*Ibid*) and concluded that the defendant had thereby waived his constitutional right to have counsel appointed for him.

There is no question of waiver here. Under the decisions of this Court a waiver must be an intentional relinquishment of a known right; the decision must be made on the basis of an intelligent and informed judgment; and every reasonable presumption against waiver is indulged. *Johnson* v. *Zerbst*, 304 U. S. 458, 464-465 (1938); *Glasser* v. *United States*, 315 U. S. 60, 70 (1942); *Adams* v. *U. S. ex rel. McCann*, 317 U. S. 269, 277-279 (1942); *Hawk* v. *Olson*, *supra*, 326 U. S. 271 (1945). Here petitioner did not even know of his right to counsel; the matter was not referred to at any time. Any claim of waiver, therefore, would be "a tenuous inference from the mere fact of a plea of guilty." *Carter* v. *Illinois*, 329 U. S. 173, 67 S. Ct. 216, 220 (1946). The *Carter* case and the decisions of this Court cited *supra*, pages 18 to 24, show that a plea of guilty does not constitute a waiver of the constitutional right to counsel where, as in this case, the accused were not advised of their right or offered counsel.

The case of *Betts* v. *Brady*, *supra*, 316 U. S. 455 (1942), is also clearly distinguishable on the facts as viewed by the majority. There was no question as to the commission of the offense charged; the sole issue was the veracity of conflicting testimony as to identification. The defendant had been before a criminal court previously; he was not wholly unfamiliar with criminal procedure; witnesses were summoned at his request and examined by him; and he was expressly found by the trial judge to be a man of ordinary intelligence, able to take care of his own interests on the trial of the narrow issue. (*Ibid*) 316 U. S. 472.

The converse is true here. Petitioners were not faced with a single narrow issue of veracity but with complex and difficult questions of interpretation of the indictment, application of the rules of criminal law and pleading, and trial strategy. The factors of experience with the criminal

procedure * and ability of the accused to defend themselves, present in the *Betts* case, are lacking. These differences assure that even the majority which found that "the totality of facts" in the *Betts* case did not indicate a denial of due process would reach the contrary result here.

Furthermore, the decisions of this Court since *Betts* v. *Brady* evidence that it has been confined to its own particular facts, if not overruled. The case has never been cited by this Court as authority for upholding a conviction. Neither the majority nor the dissenting minority in *Williams* v. *Kaiser, supra,* 323 U. S. 471 (1945), and *Tomkins* v. *Missouri, supra,* 323 U. S. 485 (1945), referred to the case despite the fact that the respondent State of Missouri placed its main reliance upon it.** The doubt thus cast on its authority was expressly recognized by this Court in *House* v. *Mayo, supra,* 324 U. S. 42 (1942), where the Court stated (p. 46):

> "We need not consider whether the State would have been required to appoint counsel for petitioner on the facts alleged in the petition. Compare *Betts* v. *Brady,* 316 U. S. 455, with *Williams* v. *Kaiser, supra,* and *Tomkins* v. *Missouri,* 323 U. S. 485."

See also *White* v *Ragen,* 324 U. S. 760, 764 (1945).

Betts v. *Brady* was again ignored in *Rice* v. *Olson, supra,*

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* That petitioners have not previously been convicted appears from the failure of the State's Attorney to invoke the Illinois Habitual Criminal Statute (Ill. Rev. Stat. (1935), Chap. 38, par. 631; (1945) Chap. 38, par. 602), which would have resulted in mandatory life imprisonment for conviction of a second offense. **People v. Poepp,** 394 Ill. 216, 68 N. E. 2d 254 (1944).

** See briefs of Respondent State of Missouri in **Williams v. Kaiser,** pp. 7 et seq., and **Tomkins v. Missouri,** pp. 38 et seq.

324 U. S. 786 (1945), although the respondent State of Missouri pitched its main argument upon the decision.* Treatment in *Canizio* v. *New York, supra,* 327 U. S. 83 (1946), is even more striking, for *Betts* v. *Brady* was there cited only on the question of jurisdiction; the succeeding paragraph of the opinion, which stated the substantive rule of due process as quoted *supra,* page 23, completely ignored the case despite the emphasis placed upon it in the respondent's brief.** This pointed disregard of *Betts* v. *Brady* in many subsequent cases evidences that its authority has been limited to its own particular facts and that it is not controlling on the substantive question of the right of an accused to be represented by counsel.

III.

THE PETITIONERS HAVING BEEN DENIED DUE PROCESS OF LAW, THE SENTENCE AND JUDGMENT AGAINST THEM ARE VOID.

The denial of due process to petitioners as established in Points I and II, *supra,* renders their sentence and judgment "absolutely void." See, *e.g., Moore* v. *Dempsey,* 261 U. S. 86, 92 (1923). The question of guilt or innocence is not before this Court; it is enough that petitioners did not receive a fair trial. See *Glasser* v. *United States, supra,* 315 U. S. 60, 76 (1942):

> "• • • The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice resulting from its denial."

See also *Williams* v. *Kaiser, supra,* 323 U. S. 471, 475 (1944).

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* See brief for Respondent State of Missouri, pp. 10-11.

** See brief for Respondent State of New York, pp. 21-25.

Because of the failure to accord petitioners the right to counsel guaranteed by the Fourteenth Amendment the judgments must be reversed. See, *e.g.*, *Powell* v. *Alabama*, 287 U. S. 45 (1932); *Smith* v. *O'Grady*, 312 U. S. 329, 334 (1941); cf. *Johnson* v. *Zerbst*, 304 U. S. 458, 467 (1938).

Conclusion.

It is respectfully submitted that the judgment of the Supreme Court of Illinois should be reversed.

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April 15, 1947.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 540

NELSON FOSTER AND GEORGE PAYNE,
Petitioners,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

REPLY BRIEF FOR PETITIONERS

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May 5, 1947.

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

REPLY BRIEF FOR PETITIONERS

Respondent's Brief contends that the Illinois rule as to the right to counsel applied against petitioners here exists in a majority of the states. It interprets the decisions of this Court as holding that there is no violation of due process unless it is affirmatively shown that the accused was prejudiced by failure to have counsel or that "special circumstances," such as extraordinarily complex legal questions, existed. Respondent characterizes the showing of the difficultles confronting petitioners during the state court proceedings as mere "inferences" or "presumptions" not sufficient to invoke the right to counsel. Respondent further suggests that petitioners have chosen the wrong remedy under Illinois procedure, and that this Court on review should therefore not reverse for a new trial on the issue of guilt.

We will show that the due process question of right to counsel is rightfully before this Court; that under the decisions of this Court no showing of actual prejudice to the accused in

criminal cases is necessary to invoke the right to counsel; that the record in this case and the statutes and case law of the State of Illinois, which are a matter of judicial notice, demonstrate the difficulty and complexity of the questions facing petitioners and therefore their need for counsel; and finally, that a minority rather than a majority of the states adopt the rigorous and inequitable rule of the State of Illinois as to right to counsel in criminal cases.

ARGUMENT

I.

THE SUBSTANTIVE QUESTION OF THE RIGHT TO COUNSEL UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION IS PROPERLY BEFORE THIS COURT, AND PETITIONERS HAVE CHOSEN THE ONLY PROCEDURE AVAILABLE TO THEM UNDER ILLINOIS LAW.

The opinion of the Supreme Court of Illinois in this case ineluctably demonstrates that that Court decided the substantive federal question of the right to counsel and disposed of the petitioners' writ of error on the basis of the Illinois rule that petitioners waived said right by failing to request that counsel be appointed for them, despite the failure of the trial court even to advise them of their right to counsel (R. 9). The question of the validity of the application of the Illinois rule under the circumstances of this case is therefore squarely before this Court. See *Hawk* v. *Olson*, 326 U.S. 271 (1945), where the Court said (p. 278):

> "As the Supreme Court of Nebraska considered the motion for continuance on the merits, no question of state procedure for the reexamination of criminal convictions arises."

See also *Smith* v. *O'Grady*, 312 U.S. 329, 331 (1941); *Rice* v. *Olson*, 324 U.S. 786, 791 (1945).

Since Respondent apparently concedes that the Illinois Supreme Court decided the right to counsel question on the merits, its suggestion that petitioners' proper remedy under Illinois law was by *coram nobis*, thus implying that writ of error was not appropriate, is irrelevant. However, analysis of Respondent's position may be of interest. It should first be noted that this position is inconsistent with its concession that the petitioners in *Carter* v. *Illinois*, 329 U.S. 173 (1946), had, in filing a motion for writ of error—the same procedure here invoked—chosen the correct method of raising the due process question of right to counsel under Illinois law. It is also inconsistent with Respondent's failure to raise any question as to the procedure followed by petitioners in this case in its briefs to the Supreme Court of Illinois and in opposition to *certiorari*.

Furthermore, the Illinois statute[1] and court decisions[2] have long established that writ of error is the appropriate method for review of judgments in criminal cases. Indeed, under the circumstances of this case, writ of error was the *only* remedy available.[3] Petitioners here rely upon the failure of the trial judge to

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[1]The statute reads:

"Writs of error in all criminal cases, where sentence is not death, shall be considered as writs of right and issued of course." Ill. Rev. Stat. (1945), Ch. 38, section 771.

[2]*Mohler* v. *People*, 24 Ill. 26 (1860); *Ingraham* v. *People*, 94 Ill. 428 (1880); *Gallagher* v. *People*, 207 Ill. 247, 69 N.E. 962 (1904); *People* v. *Johnson*, 285 Ill. 194, 120 N.E. 453 (1918); *People* v. *Thompson*, 392 Ill. 589, 65 N.E. (2d) 362 (1946); see also *United States* v. *Ragen*, 143 F. (2d) 774, 777 (C.C.A. 7th, 1944).

[3]Respondent's suggestion (Respondent's Brief, p. 15) that petitioners can obtain relief through a motion to vacate the judgment against them is not supported by the case cited. (*People* v. *Bogolawski*, 317 Ill. 499 [1925]). The Court there held only that a denial of a motion to withdraw a plea of guilty was error. A motion by petitioners to vacate the judgment against them would have been barred by the fact that the term of court in which they were convicted had expired. *People* v. *Collins*, 353 Ill. 468, 187 N. E. 450 (1933); Cf. *People* v. *Watson*, 394 Ill. 177, 68 N.E. 265 (1946).

advise them of their right to counsel or to assign counsel to represent them. Although a sharply divided court indicated in *People* v. *Green*, 355 Ill. 468, 189 N.E. 500 (1934) (Respondent's Brief, p. 14), that *coram nobis* was appropriate to raise a question of right to counsel, the later unanimous decision in *People* v. *Parcora*, 358 Ill. 448, 193 N.E. 477 (1934), is directly to the contrary. The court there ruled that *coram nobis* was designed to correct errors which the trial court would not have committed if it had been in possession of facts then unknown to it, and therefore was not available when the basis of the claim was the accused's lack of counsel, inasmuch as this fact was certainly not unknown to the trial judge.

Other procedural rules also bar the use of this remedy. In Illinois *coram nobis* is available only for review of facts not appearing on the face of the record and does not lie to correct errors of the court upon questions of law. *People* v. *Rave*, 392 Ill. 435, 65 N. E. (2d) 23 (1946); *People* v. *Noonan*, 276 Ill. 430, 114 N. E. 928 (1917). Since petitioners in this case are relying upon the showing of the common law record that they were not advised of their right to or offered counsel, and were not represented by counsel, and since these facts were well known to the trial court and appear from the record made by it, and since the trial court's error was one of law, *coram nobis* would not lie.[1] And even if the remedy of *coram nobis* were not barred by these rules, it would be unavailable because more than five years passed since the final judgment against petitioners. *People* v. *Rave*, *supra*, 392 Ill. 435, 443, 65 N.E. (2d) 23, 27 (1946); *People* v. *Sprague*, 371 Ill. 627, 629, 21 N.E. (2d) 763, 764 (1939); *People* v. *Dabbs*, 372 Ill. 160, 166, 23 N.E. (2d) 343, 346 (1939).

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[1]It should be noted that Respondent's contention that this Court assumed *coram nobis* an adequate remedy in *Woods* v. *Nierstheimer*, 328 U. S. 211 (1946); *White* v. *Ragen* and *Lutz* v. *Ragen*, 324 U. S. 760 (1945), is incorrect. The decisions held merely that *habeas corpus* was not the proper procedure under Illinois law and did not pass upon the availability of *coram nobis*.

II.

PETITIONERS WERE DENIED DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT AS INTERPRETED BY THIS COURT.

Respondent repeatedly states the issue before this Court as whether the Fourteenth Amendment imposes an absolute requirement that counsel be appointed for accused in state criminal cases (Respondent's Brief, pp. 9, 13, 16, 18). But petitioners need not and do not rely on such a rule. The simple issue here is whether under the circumstances of this case petitioners were denied due process under the Fourteenth Amendment by the failure of the trial court to appoint or offer to appoint counsel for them or even to advise them of their right to counsel. Respondent's misapprehension of the question is, we believe, largely responsible for the inaccuracies in its classification of state cases (*infra*, Point III) and its analysis of the decisions of this Court.

To illustrate, Respondent contends (Respondent's Brief, pp. 3, 4, and 14) that petitioners must affirmatively show that they were prejudiced by the absence of counsel. True it is that this Court has at times reviewed the record to ascertain whether accused were prejudiced in cases where they had waived counsel (*Adams* v. *U. S.*, 317 U. S. 269 (1942)) or where, counsel having appeared, the claim was that their assistance was ineffective (*Powell* v. *Alabama*, 287 U. S. 45 (1932); *Avery* v. *Alabama*, 308 U. S. 444 (1939)). But where there is no waiver and no counsel appeared, a different question is presented. Thus the Court in *Avery* v. *Alabama*, *supra*, 308 U. S. 444, 445, stated:

> "Had petitioner been denied any representation of counsel at all, such a clear violation of the Fourteenth Amendment's guarantee of assistance of counsel would have required a reversal of his conviction."

Under these circumstances a showing of prejudice is unnecessary. *Williams* v. *Kaiser*, 323 U. S. 471, 475 (1944); *Tomkins* v.

Missouri, 323 U. S. 485, 488 (1945); *Canizio* v. *New York*, 327 U. S. 82, 85 (1946); *Glasser* v. *United States*, 315 U. S. 60, 76 (1942); *Hawk* v. *Olson*, 326 U. S. 271, 278–279 (1945).

Respondent also argues that in order for a denial of counsel to amount to a deprivation of due process, there must be "special circumstances" such as a complex case or a less than ordinarily understanding defendant (Respondent's Brief, pp. 4, 11, 13, 18). In its review of the decisions of this Court involving right to counsel, Respondent hurdles the substantial similarities between the situation of the accused in such cases and that of the petitioners here. For instance, it would explain *Rice* v. *Olson*, 324 U. S. 786 (1945), on the ground that the accused was an Indian and that among the legal questions involved was one of jurisdiction of the court, as contrasted with those facing the petitioners in this case. It attempts to distinguish *Canizio* v. *New York*, 327 U. S. 82 (1946); *Williams* v. *Kaiser*, 323 U. S. 471 (1945); *Tomkins* v. *Missouri*, 323 U. S. 471 (1945), and *De Meerleer* v. *Michigan*, . . . U. S. . . ., 67 S. Ct. 596 (1947) (discussed in petitioners' brief, pages 19 to 27), only on the ground that the procedure adopted in such cases contemplated a hearing on the truth of allegations as to lack of counsel. But the procedural difference does not amount to a distinction; these cases are direct authority that where facts substantially identical to those here present and in no wise questioned by the State of Illinois are proved to exist, the accused has been denied due process. And Respondent omits to mention *Hawk* v. *Olson*, 326 U. S. 271 (1945). This Court there held that a denial of a motion for continuance violated due process where effective assistance of counsel was lacking, although expressly noting that "there is no allegation or suggestion of ignorance of or unfamiliarity with procedural or substantive law or sub-normal mentality." 326 U. S. 277–278.

These decisions demonstrate that if any "special circumstances" are necessary in a case such as this, such circumstances are merely the existence of questions of law and procedure such as faced petitioners here (Petitioners' Brief, pp. 13–18). Re-

spondent criticizes this discussion as consisting of inference, deduction or presumption (Respondent's Brief, pp. 3, 17–18). But merely the questions involved in the interpretation of the indictment and determination of pleading strategy[1] were obviously beyond the capacity of persons not trained in the law (Petitioners' Brief, p. 13). Respondent says the indictment was orthodox in form (Respondent's Brief, pp. 2, 17). The answer is that orthodoxy to a lawyer may mean bewilderment and confusion to a layman.

Respondent's argument also omits reference to the complicated and difficult questions of interpretation of Illinois statutes and decisions with which petitioners were confronted. These cannot be dismissed as presumptions, inferences or deductions. This Court takes judicial notice of State statutes and decisions and the issues posed thereby. It has done so in substantially identical cases. *Williams* v. *Kaiser*, 323 U. S. 474–476 (1945); *Tomkins* v. *Missouri*, 323 U. S. 488–489 (1945); *Canizio* v. *New York*, 327 U. S. 82, 86 (1946).

There remain to be considered the decisions of this Court on which Respondent relied. *Betts* v. *Brady*, 316 U. S. 455 (1941), and *Carter* v. *Illinois*, 329 U. S. 173 (1946), were distinguished in petitioners' main brief, pages 25–27. In fact, the majority's express reliance in the *Carter case* on the record showing of advice to the accused of his right to counsel and its inference therefrom that benefit of counsel was waived indicate that, where the record shows the absence of such advice and Respondent has not claimed that petitioners waived their right to counsel, a different result must follow. And *Adams* v. *U. S. ex rel McCann*, 317 U. S. 269 (1942), also militates against rather than in favor of the Respondent's position. In that case there was an express and written waiver; yet the Court affirmed the conviction only after a determination that the waiver was

[1]Respondent fails to note that indictments for petty larceny were contained in the single printed form setting forth the indictments for burglary.

intelligently and understandingly made. Here there was no waiver at all.

Respondent's Brief implies that there is an important distinction between capital and non-capital cases as regards the right of an accused to counsel. This is clearly refuted by recent decisions of this Court in the following non-capital cases: *White* v. *Ragen*, 324 U. S. 760 (1945); *Rice* v. *Olson*, 324 U. S. 786 (1945); *Canizio* v. *New York*, 327 U. S. 82 (1946); *De Meerleer* v. *Michigan*, . . . U. S. . . ., 67 S. Ct. 596 (1947); *House* v. *Mayo*, 324 U. S. 42 (1945). The test now is whether the defendant is "on trial in a state court on a *serious criminal* charge." *White* v. *Ragen*, 324 U. S. 760, 763.

Respondent also appears to suggest that inasmuch as a reversal by this Court of the decision of the Illinois Supreme Court will void petitioners' conviction, a stricter rule as to the right of counsel should be applied than if this case arose on *habeas corpus*. Obviously procedural differences do not vary the requirements of due process. When the method of procedure by which a case has reached this Court necessitates reversal for a new trial on the issue of guilt, this Court will void the conviction. *Powell* v. *Alabama*, 287 U. S. 45 (1932); cf. *Norris* v. *Alabama*, 294 U. S. 587 (1935); *Hill* v. *Texas*, 316 U. S. 400, 406 (1942).

III.

A SUBSTANTIAL MAJORITY OF THE STATES DO NOT FOLLOW THE ILLINOIS RULE AS TO RIGHT TO COUNSEL.

Respondent relies heavily upon State cases as indicating general acceptance of the Illinois rule that a failure to request counsel operates as a waiver of the right to counsel, even if the accused was not advised of and was ignorant of said right (Respondent's Brief, pp. 6–8, 20–21). Inasmuch as petitioners

here base their claim on the Fourteenth Amendment to the Federal Constitution and as this Court has on several occasions declared similar State rules invalid, the authority of State cases is questionable. However, for the convenience of this Court we have reviewed the Respondent's analysis of the State authorities and statutes and our comments thereon and corrections thereof appear in an appendix to this brief.

This appendix shows that some of the decisions cited by Respondent do not support the proposition that a failure to request counsel constitutes a waiver of the right to counsel, and that others have been superseded by statute. This is also true of some of the decisions collected on page 21 of Respondent's brief as supporting the proposition that a defendant who pleads guilty to a non-capital offense without requesting counsel thereby waives his right to counsel.

However, aside from the foregoing errors, the classification of cases on pages 20 and 21 of Respondent's brief begs the question now before this Court. The contention of petitioners is that they were entitled to be advised of their right to counsel regardless of whether or not, after being so advised, they would be held to waive counsel in the event they did not request counsel. To the extent that the respective State rules may be of significance, it would therefore seem that the following classification would be more enlightening.[1]

1. States in which it is expressly required that one accused of a non-capital offense be advised of his right to counsel:

Arizona	Minnesota	Oregon
Arkansas	Montana	Pennsylvania
California	New York	South Dakota
Idaho	North Dakota	Utah
Iowa	Oklahoma	Washington
Kansas		Wisconsin

[1]The classification cites State rules in accordance with State statutes and decisions, and accordingly does not reflect the decisions of this Court overruling State decisions predicated upon State rules.

2. States in w. ch courts have a mandatory duty to appoint counsel in non-capital cases although there is no statute or decision expressly dealing with the duty to advise of the right to counsel.

Colorado	Nevada	North Carolina
Connecticut	New Mexico	Ohio
Indiana	Vermont	Tennessee
Maine		

3. States in which there has been no determination of the necessity of advising one accused of a non-capital offense of his right to counsel but where it is provided that counsel is waived if not requested:

Kentucky	Nebraska	Virginia
Louisiana	New Hampshire	West Virginia
Missouri	New Jersey	Wyoming

4. States in which it is expressly provided that there is no duty to advise one accused of a non-capital offense of his right to counsel:

Florida
Georgia
Illinois

5. States in which one accused of a non-capital offense has no right to counsel or where the appointment of counsel is a matter for the discretion of the trial court:

Alabama	Michigan (on guilty plea)
Delaware	Rhode Island
Maryland	South Carolina
Mississippi	Texas
Massachusetts (on guilty plea)	

The Illinois rule or its equivalent therefore prevails in only a minority of the 48 states.

CONCLUSION

It is respectfully submitted that petitioners were denied due process of law, and the decision of the Supreme Court of Illinois should be reversed.

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May 5, 1947.

APPENDIX

The summary of constitutional and statutory provisions and court decisions relating to right of counsel appearing on pages 22–46 of the appendix to Respondent's brief is inaccurate or incomplete in certain instances. The following corrections or additions should be made:

Alabama:

Correctly set forth on page 22 of Respondent's brief.

Arizona:

Arizona Code Annotated, 1939, Chapter 44, Section 44–905.

> "If the defendant appear for arraignment without counsel, he shall be informed by the court that it is his right to have counsel before being arraigned, and shall be asked if he desires the aid of counsel; * * *."

Arkansas:

Correctly set forth on page 23 of Respondent's brief.

California:

Penal Code of California, Deering 1941, paragraph 859A (enacted in 1935):

> "* * * The foregoing provisions of this section shall not be construed to authorize the receiving of a plea of guilty from any defendant not represented by counsel."

Colorado:

Statute quoted in Respondent's brief, page 25, is quoted inaccurately. In the fifth line of the quotation the word "defense" should be followed by a comma, not a period, and the word "it" should begin with a small letter. When read after this change it is clear that this statute does not define the court's duties, but merely sets out the provision for payment of fees.

Colorado Statutes Annotated, Chapter 48, paragraph 471, is not quoted by Respondent and reads as follows:

> "The accused shall have the right to appear in person and by counsel. If he has no counsel the judge shall assign him one in that behalf only."

Connecticut:

Correctly set forth on page 25 of Respondent's brief.

Delaware:

Correctly set forth on page 26 of Respondent's brief.

Florida:

Correctly set forth on page 26 of Respondent's brief.

Georgia:

Correctly set forth on page 27 of Respondent's brief.

Idaho:

Correctly set forth on page 27 of Respondent's brief.

Illinois:

Correctly set forth in briefs proper of both parties.

Indiana:

As intimated in Respondent's brief, page 29, the requirement of appointment of counsel in Indiana is mandatory unless the accused freely and understandingly waives his rights. See also *Knox County Council* v. *State ex rel. McCormick*, 217 Indiana 493, 29 N.E. (2d) 405 (1940).

Iowa:

Correctly set forth on page 29 of Respondent's brief.

Kansas:

See the 1941 statute quoted at page 30 of Respondent's brief. It is true that prior to this statute the requirement of appointment was not mandatory. The statute is perfectly clear, and

the case cited by Respondent at page 30 for the proposition that the effect of the statute is not certain is irrelevant, since the conviction in that case occurred prior to the enactment of the 1941 statute.

Kentucky:

Correctly set forth on page 30 of Respondent's brief.

Louisiana:

A later case than any cited by Respondent is *State* v. *Youchunas*, 187 Louisiana 281, 174 Southern 356 (1937), holding that at least in felony cases the record must show whether or not the defendant had counsel and, if it shows that he did not, a good excuse for the failure to appoint counsel must appear of record or the conviction will not stand.

Maine:

The applicable statute, not quoted by Respondent, is Laws of Maine 1945, Chapter 135, Section 11, which provides:

> "Competent counsel shall be assigned by the court in cases punishable by imprisonment for life, when it appears that the accused has not sufficient means to employ counsel."

Maryland:

The Maryland statute, not quoted by Respondent, leaves the matter of counsel entirely up to the discretion of the court. The applicable statute is Article XXVI, Section 7, Maryland Annotated Statutes, which provides for appointment of counsel "whenever in the judgment of the court in which any case is pending a just regard for the rights of the accused requires it."

Massachusetts:

Correctly set forth on page 32 of Respondent's brief.

Michigan:

Correctly set forth on page 32 of Respondent's brief.

Minnesota:

Correctly set forth on page 33 of Respondent's brief.

Mississippi:

Correctly set forth on page 33 of Respondent's brief.

Montana:

Correctly set forth on page 34 of Respondent's brief.

Missouri:

Correctly set forth on page 34 of Respondent's brief.

Nebraska:

Correctly set forth on page 34 of Respondent's brief.

Nevada:

While the earlier Nevada cases appear to hold that a request for counsel is required, the later cases do not. See *Ex parte Kramer*, 122 Pac. (2d) 862, cited in Respondent's brief, page 35, where the court said at page 877:

> "* * * From the time of the arraignment until the beginning of trial * * * accused has the right to the aid of counsel in a real sense."

and also at page 877:

> "* * * Accused is entitled to have counsel before as well as at the trial and at every stage of the proceedings."

New Hampshire:

Correctly set forth on page 35 of Respondent's brief.

New Jersey:

Correctly set forth on page 36 of Respondent's brief.

New Mexico:

Correctly set forth on page 36 of Respondent's brief.

New York:

The more recent New York cases do not follow the request rule but hold that appointment of counsel is mandatory. *People* v. *Sedlak*, 53 N. Y. S. (2d) 51, (1944); *People ex rel. Moore* v. *Hunt*, 25 App. Div. 24, 16 N. Y. S. (2d) 19, (1938); *People* v. *Foster*, 59 N. Y. S. (2d) 477 (1945).

North Carolina:

The statutes and cases cited in Respondent's brief, page 37, indicate that the appointment of counsel is mandatory only in capital cases. It has been held, however, that it is also mandatory in non-capital cases. *State* v. *Hardy*, 189 North Carolina 799, 128 S. E. 152 (1925), where the court said at page 153:

> "* * * The right of every man, accused, prosecuted, or put on trial upon a criminal charge, to be heard, and to have counsel in all matters necessary for his defense * * * is too fundamental for discussion."

North Dakota:

The statute is correctly quoted at page 38 of Respondent's brief. See also *State* v. *Throndson*, 49 North Dakota 345, 191 N. W. 628 (1922), holding that an intelligent waiver of the right to counsel is possible, but noting the importance of the fact that defendant was advised of his rights to counsel, and indicating that without such advice intelligent waiver is not possible.

Ohio:

Correctly set forth on page 38 of Respondent's brief.

Oklahoma:

Correctly set forth on page 38 of Respondent's brief.

Oregon:

Correctly set forth on page 39 of Respondent's brief.

Pennsylvania:

Correctly set forth on page 40 of Respondent's brief.

Rhode Island:

Correctly set forth on page 40 of Respondent's brief.

South Carolina:

Correctly set forth on page 40 of Respondent's brief.

South Dakota:

Correctly set forth on page 41 of Respondent's brief.

Tennessee:

Statute correctly cited at page 42 of Respondent's brief; also Williams' Tennessee Code Annotated, Section 11733, providing:

> "Every person accused of any crime or misdemeanor whatsoever is entitled to counsel in all matters necessary for his defense, as well as to facts as to law."

The case of *Kizer* v. *State*, 80 Tennessee (12 Lea), 564, cited in Respondent's brief, page 42, is misstated therein. The case did not involve a refusal to appoint counsel, but rather a reasonable limitation by the court on the time allowed for argument by accused's counsel.

Texas:

Correctly set forth on page 42 of Respondent's brief.

Utah:

The cases cited by Respondent at page 43 are not in point, since they do not involve the right to counsel.

Vermont:

The case of *State* v. *Gomez*, 89 Vt. 490, cited at page 43 of Respondent's brief, is incorrectly stated inasmuch as it does not

deal with when the court must assign counsel but only with the matter of when the state must pay for counsel.

Virginia:

Correctly set forth on page 44 of Respondent's brief.

Washington:

Correctly set forth on page 44 of Respondent's brief.

West Virginia:

Correctly set forth on page 45 of Respondent's brief.

Wisconsin:

While the case of *State ex rel. Doxtater* v. *Murphy*, 248 Wis. 593, 22 N. W. (2d) 685, cited by Respondent at page 46, does set forth Wisconsin's procedural requirements for habeas corpus, such requirements would not apply to a review on writ of error, as here. The court said in that case, at page 595:

> "The defendant, the petitioner here, took no appeal from the judgment and sentence of the court. If such an appeal had been taken undoubtedly error would have been confessed and the case remanded to the trial court."

The case of *State ex rel. Drankovich* v. *Murphy*, 248 Wis. 433 22 N.W. (2d) 540, indicates that Wisconsin also requires appointment of counsel.

Wyoming:

Correctly set forth on page 46 of Respondent's brief.

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946.

No. 540

NELSON FOSTER AND GEORGE PAYNE,
Petitioners,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF FOR RESPONDENT.

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IN THE

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OCTOBER TERM, A. D. 1946.

No. 540

NELSON FOSTER AND GEORGE PAYNE,
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vs.

THE PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF FOR RESPONDENT.

RESPONDENT'S STATEMENT OF THE CASE.

Counsel whom this court has appointed for petitioners has accurately stated the full substance of the record. However, being naturally and understandably anxious to present his case in the aspect most favorable to men whose liberty is at stake and to whom he owes the highest responsibility, he has, by accent upon and emphasis of certain features of the record, cast his statement in a somewhat tendentious form.

Focus of emphasis in stating facts is highly commendable in an advocate for an accused. It should be forborne

by counsel for the state until the argument. We therefore summarize the naked facts of the record in a form which is the more brief because petitioners' statement is complete in substance.

The Facts Appearing on the Record.

Petitioners were charged by indictment with burglary of a dwelling house and petty larceny of property of the value of five dollars in the circuit court of Pulaski County, Illinois, on February 22, 1935. The indictment was, as counsel for petitioners points out, orthodox and therefore technical in its verbiage. One of the burglary counts accused the defendants in substance of breaking and entering without force while the other count charged them with breaking and entering with force, both counts charging criminal intent. These counts embodied alternative forms of the Illinois statutory charge of burglary (Ill. Rev. Stats. 1933, Ch. 38, par. 84).

On the same day, according to the record (R. 3-4), petitioners were furnished with a copy of the indictment, a list of the jurors and a list of the State's witnesses, were advised of their "rights of Trial and of the consequences of an entry of a plea of guilty" (R. 3), and, being arraigned, pleaded "guilty of burglary and larceny as charged in the indictment."

The record recites that thereupon each of said defendants still "presist (*sic*) in such pleas of guilty" (R. 3). The court then found the ages of petitioner Foster to be 34 years and of petitioner Payne (*alias* Jefferson) to be 48 years.

The judgment of the court was the statutory sentence for a period of not less than one year and which might extend to life. (Cahill's Ill. Rev. Stats. 1933, Ch. 38, par.

65. 1945, Ch. 38, par. 84.) At the time that the sentence was imposed, the court had no discretion with respect to the minimum or maximum term that one convicted of felony might serve in Illinois except in capital cases, rape and arson.[1] (Cahill's Ill. Rev. Stats., 1933, Ch. 38, pars. 795-796.)

The record is silent as to the matter of counsel.

These, then, are the only facts in this case explicitly patent upon the record. All other statement as to or discussion of facts, either upon the part of counsel for the petitioners or ourselves, is in the nature of inference, deduction or asserted presumption.

The Questions Presented.

We do not conceive the questions presented in the same terms that petitioners' counsel conceives them. We deem them to arise from the following considerations:

This court has held that **upon an affirmative showing of prejudice, either appearing in the record or alleged in proceedings contemplating and appropriate to a hearing of evidence dehors the record,** due process is denied by a State court's failure to appoint counsel even though the case is non-capital, counsel is not requested, and a plea of

---

[1] As counsel for petitioners observes in the margin of page 5 of his brief, petitioners asserted by extrajudicial interpolations which 'the' appended to the otherwise properly authenticated record in the Supreme Court of Illinois charges of matter *dehors* that record to the effect that they were told by the State's Attorney that they did not need counsel and would be sentenced merely to one year in the penitentiary. But petitioners' counsel concedes that this charge was not supported by any fact appearing in the common law record and recognizes the pertinency of this court's holding in *Carter* v. *Illinois*, 329 U. S. 173, that Illinois does not deny due process when, in accordance with this court's own practice, it refuses to consider assertion of matter *dehors* the record on writ of error or other strictly appellate review. See, e.g., *Mathews* v. *United States*, 123 U. S. 182; where this court recognized that on its writ of error its review was confined to the record; and *Claassen* v. *United States*, 142 U. S. 140, where this court said, at page 147:

> "Upon writ of error, no error in law can be reviewed by this court which does not appear upon the record, or by bill of exceptions made part of the record."

guilty is received. Illinois concedes this rule (*Rice* v. *Olson*, [illegible] U. S. 786, and other cases cited by petitioners' counsel).

But it has also held that **absent a showing of prejudice,** due process is not denied by the fact *per se* of failure to appoint counsel, even though the plea is not guilty and counsel is requested, in a non-capital case (*Betts* v. *Brady*, 316 U. S. 455, cf. *Adams* v. *United States*, 317 U. S. 269). And this is true even in a capital case where the right is intelligently waived if prejudice, though charged, does not appear upon the record. (*Carter* v. *Illinois*, 329 U. S. 173.) Therefore the questions emerge:

1. Does federal due process require the appointment of counsel before receiving pleas of guilty in all non-capital State cases where the punishment may extend for many years or life unless the right is waived, or must special circumstances, such as a more than ordinarily complex case or a less than ordinarily understanding defendant, be present in order to require the appointment of counsel?

2. If special circumstances must be present in order to entitle one accused of a non-capital offense in a State court to counsel, must the existence of such special circumstances be presumed where, as in this case, the record contains no explicit matter rebutting such presumption, or may the state remit accused to such *de novo* proceedings as *habeas corpus* or *coram nobis* for inquiry as to such circumstances?

ARGUMENT.

I.

Federal due process does not imply a categorical right to counsel in non-capital State cases. Special circumstances, such as a more than ordinarily complex case or a less than ordinarily understanding accused, must exist in order to warrant invocation of the Fourteenth Amendment.

In *Adams* v. *United States*, 317 U. S. 269, a case cited and heavily relied upon by petitioners, this court said at pages 276-277:

> "* * * Legislation apart, no social policy calls for the adoption by the courts of an inexorable rule that guilt must be determined only by trial and not by admission. A plea of guilt expresses the defendant's belief that his acts were proscribed by law and that he cannot successfully be defended. * * * **And not even now is it suggested that a layman cannot plead guilty unless he has the opinion of a lawyer on the questions of law that might arise if he did not admit his guilt. Plainly, the engrafting of such a requirement upon the Constitution would be a gratuitous dislocation of the processes of justice.** * * *" (Emphasis supplied.)

The language above quoted is the more incisive because in that case the specific guaranty of the right to counsel of the Sixth Amendment was invoked.

The question: DOES FEDERAL DUE PROCESS CATEGORICALLY IMPLY THE RIGHT OF COUNSEL UPON ARRAIGNMENT IN NON-CAPITAL STATE CRIMINAL CASES? must be considered in an historical, social and legal context that we discuss below.

The practice of receiving pleas of guilty without tendering counsel was inveterate and very general throughout the United States before the advent of the Fourteenth

Amendment. (*Betts* v. *Brady*, 316 U. S. 455.) It has continued to be the general, indeed, to constitute the common practice in at least half the states of the Union, since the adoption of that amendment. (See historical discussion, *post.*) Therefore, to the extent that consensus on the part of state courts is valid as a *criterion* for the construction of an amendment applicable only to the states, any claim that the right to counsel in non-capital cases is implicit in the notion of civilized government must fail.

Counsel associated with the writer of this brief have prepared a "*Study of the Right to Counsel in State Criminal Cases,*" which is annexed to this brief as Appendix thereof. (*Post*, page 20.) It amplifies and brings down to date the similar study appended to this court's opinion in *Betts* v. *Brady*, 316 U. S. 455.

This court's study appended to its opinion in *Betts* v. *Brady* and our own survey leave no doubt of the following historical and contemporary facts of criminal jurisprudence in state courts:

RIGHT TO COUNSEL IN STATE CRIMINAL CASES: HISTORICAL CONSIDERATIONS.

In the cases cited in the margin, courts of review in twenty-four states have directly held that there is a waiver of the right to counsel where the accused fails to request counsel.[2] Since a few courts do not seem to have passed upon the question, it follows that a majority of states passing on the question have adopted this view.

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[2] ALABAMA: *Mackreth* v. *Wilson*, 31 Ala. App. 191, 15 So. (2d) 112, Cert. den. 15 So. (2d) 114; CALIFORNIA: *People* v. *Looney*, 9 Cal. App. (2d) 335, 49 P. (2d) 889; *Davis* v. *Crowder*, 78 P. (2d) 1039; FLORIDA: *Weatherford* v. *State*, 76 Fla. 219, 79 So. 680; GEORGIA: *Rowland* v. *State*, 72 Ga. App. 793, 35 S. E. (2d) 372, 375; *Gatlin* v. *State*, 17 Ga. App. 406, 878 E. 151; *Gatlin* v. *State*, 87 S. E. 151, 17 Ga. App. 406; IDAHO: *State* v. *Athens* (1922), 36 Ida. 224, 210 P. 133, 134; ILLINOIS: *People* v. *Fuhs*, 390 Ill. 41; *People* v. *Corbett*, 387 Ill. 41; *People* v. *Lavendowski*, 326 Ill. 173; *People* v. *Batey*, 392 Ill. 390; *People* v. *Parcora*, 358 Ill. 448; INDIANA: *Loucks* v. *State*, 213 Ind. 108, 11 N. E. (2d) 694; IOWA: *Korf* v. *Jasper Co.* (1906), 132 Ia. 682, 108 N. W. 1031, 1032; KANSAS: *Jones* v. *Amrine*, 154 Kan. 629, 121 P. (2d) 263; *Loftis* v. *Amrine*, 152 Kan. 464, 105 P. (2d) 890; *Allen* v. *Amrine*, 127 P. (2d) 475, 155 Kan. 703; KENTUCKY: *Hamlin* v. *Commonwealth*, 287 Ky. 22, 152 S. W. (2d) 297;

In the cases cited below, the courts of six states have held that there is a waiver of the right to counsel where the defendant pleads guilty to a non-capital offense and fails to request counsel.[3]

Thus the courts of at least one-half of the states of the Union have not regarded the right to counsel, at least in non-capital cases where there is an acknowledgment of guilt in open court, as implicit in the concept of due process of law.

The study also collates constitutional and statutory provisions defining, recognizing or touching the right to counsel. Most states have constitutional statutory provisions guaranteeing in general terms the right to counsel. But in Alabama the statute requires appointment of counsel

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Turner v. *Commonwealth*, 89 Ky. 78, 1 S. W. 475; *Grogan* v. *Commonwealth*, 222 Ky. 482, 1 S. W. (2d) 779; *Holland* v. *Commonwealth*, 455 S. W. (2d) 476, 241 Ky. 813; LOUISIANA: *State* v. *Davis*, 171 La. 449, 131 So. 295; *State* v. *Murray* (1928), 165 La. 653, 115 So. 813; *State* v. *Sims*, 42 So. 494, 117 La. 1035; MICHIGAN: *People* v. *Fries*, 294 Mich. 382, 293 N. W. 689; *People* v. *Haddad*, 306 Mich. 556, 11 N. W. (2d) 240, 241; MISSISSIPPI: *Dugan* v. *State*, 151 Miss. 781, 119 So. 298; MISSOURI: *State* v. *Miller*, 292 S. W. 440, 442; *State* v. *Terry*, 201 Mo. 697, 100 S. W. 432; MONTANA: *State* v. *Fowler*, 196 P. 992; NEBRASKA: *Alexander* v. *O'Grady*, 137 Nebr. 645, 290 N. W. 718; *Davis* v. *O'Grady*, 137 Nebr. 708, 291 N. W. 82, 86; *Ex Parte Tail*, 145 Nebr. 268, 16 N. W. (2d) 161, 162; NEVADA: *State* v. *Mackinnon*, 168 P. 330, 41 Nev. 182; NEW JERSEY: *State* v. *Murphy*, 87 N. J. L. 515, 94 A. 640; *State* v. *Raney*, 63 N. J. L. 363, 43 A. 677; NEW YORK: *People* v. *Price*, 262 N. Y. 410; 187 N. E. 298, 300; PENNSYLVANIA: *Commonwealth* v. *Smith*, 344 Pa. 41, 24 Atl. (2d) 1; *Commonwealth* v. *Smith*, 147 Pa. Super. 423, 24 Atl. (2d) 724; *Commonwealth* v. *Burke*, 158 Pa. Super. 87, 43 Atl. (2d) 921; *Commonwealth* v. *Smith*, 158 Pa. Super. 104, 43 A. (2d) 906; *Commonwealth* v. *Ashe*, 141 Pa. Super. 408, 15 A. (2d) 409; *Commonwealth ex rel. Piccerelli* v. *Smith*, 27 A. (2d) 484; SOUTH CAROLINA: *State* v. *Jones*, 172 S. C. 129, 173 S. E. 77; TEXAS: *Brown* v. *State*, 118 Tex. Cr. R. 582, 40 S. W. (2d) 118; *Brady* v. *State*, 122 Tex. Cr. R. 275, 54 S. W. (2d) 513, 514; VIRGINIA: *Wilkinson* v. *Youell*, 180 Va. 321, 238 E. (2d) 356, 359; *Barnes* v. *Commonwealth* (1895), 92 Va. 794, 23 S. E. 784, 787; WEST VIRGINIA: *State* v. *Yoes* (1910), 67 W. Va. 546, 547, 68 S. E. 181; WYOMING: *James* v. *State* (1921), 27 Wyo. 378, 196 P. 1045.

[3] GEORGIA: *Rowland* v. *State*, 72 Ga. App. 793, 35 S. E. (2d) 372, 375; KANSAS: *Jones* v. *Amrine*, 154 Kan. 629, 121 P. (2d) 263; *Loftis* v. *Amrine*, 152 Kan. 464, 105 P. (2d) 890; MICHIGAN: *People* v. *Fries*, 294 Mich. 382, 293 N. W. 689; NEBRASKA: *Alexander* v. *O'Grady*, 137 Nebr. 645, 290 N. W. 718; *Davis* v. *O'Grady*, 137 Nebr. 708, 291 N. W. 82, 86; *Ex Parte Tail*, 145 Nebr. 268, 16 N. W. (2d) 161, 162; PENNSYLVANIA: *Commonwealth* v. *Ashe*, 141 Pa. Super. 408, 15 A. (2d) 409; VIRGINIA: *Wilkinson* v. *Youell*, 180 Va. 321, 23 S. E. (2d) 356, 359.

only in capital cases. (Code of Ala. 1940, Title 15, Art. 2, par. 318.) In Florida, although the right to appear by counsel is guaranteed (Fla. General Stats. 1906, sec. 3969), appointment of counsel is required only in capital cases. (Fla. Rev. Stats. 1941, par. 909.21.) In Massachusetts, whose jurisprudence is often consulted as a repository of legal and constitutional tradition and history because of that state's colonial origin, it was provided as late as 1932, as follows:

> "If a prisoner, under indictment for a capital crime, pleads guilty, upon being arraigned, the court shall award sentence against him; if he does not plead guilty, the court may assign him counsel and take all other measures preparatory to a trial, which shall, subject to Section 72, be held as soon after the finding of the indictment after other official duties of the justices will admit and the circumstances of the cases require." (General Laws of Mass. 1932, Ch. 277, sec. 47.)

In Mississippi, the statute provides that the right to appointed counsel as distinct from the right to appear by counsel if the defendant can himself obtain counsel, is confined to capital cases. (Miss. Code, 1930, Ch. 21, sec. 1262.)

It is perfectly true, as appears from the study that some states expressly provide for the appointment of counsel in all felonies and a few so provide even in cases of misdemeanors. (Cf. Compiled Laws of Michigan, 1929, Ch. III, sec. 17129.) In New Jersey, a statute provides that "if the defendant appears for arraignment without counsel, he must be asked if he desires the aid of counsel, and if he does the court must assign counsel." (Gilbert's Criminal Code, 1927, Ch. 4, sec. 308.) North Carolina by statute guarantees counsel to "every person accused of any crime whatsoever." (N. C. Stats. 1943, Ch. 15, sec. 15-4.) Other similar statutes will be found in the study.

But these statutory provisions, although evincing a recognition of the desirability of counsel in all criminal cases, are, when read in comparison with the statutes and decisions (cited above) in which at least half of the states of the Union have held or enacted that the right is not absolute, at least in non-capital cases, cannot be deemed declarations of American constitutional doctrine. Indeed, they may be read as at least suggesting that they were enacted, not as confirmatory of antecedently existing constitutional rights, but in recognition that there was no well understood constitutional tradition guaranteeing counsel in all felony cases in state courts.

The Circuit Court of Appeals for the Fourth Circuit has directly held that a plea of guilty to a non-capital offense raises a presumption of voluntary and competent waiver of the right to counsel. *Cundeff* v. *Nicholson*, 107 Fed. (2d) 162.

This case cannot be reversed on the common law record alone unless this court is prepared to hold that in every serious criminal case, the trial court must appoint counsel for the accused before receiving a plea of guilty or to recite affirmatively a waiver of the right. Nothing in the entire history of Anglo-American jurisprudence even suggests, much less requires, such a result. Neither the Fifth, the Sixth nor the Fourteenth Amendments has ever been construed by any court (insofar as patient research has disclosed) as requiring categorically, absolutely and mechanically, that no man may plead guilty to a non-capital crime, no matter what the circumstances, without counsel.

Should this court commit itself to the declaration of such a principle in the instant case, many thousands of prisoners now incarcerated in state prisons upon pleas of guilty entered after the right to counsel was declined would be set

at large. This result would, of course, not deter this court from such a declaration if it were convinced that the organic law of the United States could not otherwise be properly expounded.

But the practical construction, acquiesced in by nearly every *nisi prius* court and many courts of review from days long antedating the Constitution until the present moment, demonstrates conclusively and absolutely that such a holding would not serve the understanding either of the framers of the Constitution or of any of the many thousands of jurists and constitutional scholars who have perused and applied its text in criminal cases.

And where the text of the Constitution has long been construed by virtually unanimous consensus, an exegetical reading overriding that consensus is certainly not necessary and, we submit for important reasons briefly noted in the margin, is not even appropriate.[4]

This is, of course, not to say that if the record shows

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[4] A question theoretically implicit in every problem of constitutional construction and practically exigent in the instant case may be stated by asking, When the meaning of the Constitution is sought, whose understanding is to determine the "meaning"? Is it the meaning of that instrument to its authors, or to those who adopted the Constitution and the several amendments that have been added thereto by voting in favor thereof, or to academicians in the field of political philosophy, or to lawyers generally, or to the hypothetical "reasonable man"? And if the latter, then is it the probable meaning to the "reasonable man" of the time of the adoption of the Constitution (or the amendment in question, as the case may be), or to the "reasonable man" of today? Or is it perchance a composite question of what ideas a "reasonable man of today" would ascribe to a putative "reasonable man" reading the constitutional language at the time of its adoption?

While it is this court that decides questions of constitutional interpretation, it does so upon the assumption that it is reading a document that has been read by others whose understanding of its language is important. In short, this court must state its own understanding of a presumable "general" understanding of the constitution as a document, not of this court alone, but of the people.

In the instant case, the court is confronted with a plea of guilty entered in a form and mode that has been known to the common law for centuries. Unanimous, or virtually unanimous, approbation of the acceptance of such pleas where counsel is offered and declined is, we submit, not merely relevant but *conclusive* on what the constitution means in this connection to those intrusted with supporting and enforcing it.

that in a given case, the accused should have been tendered counsel in order to prevent a miscarriage of justice, due process would not be denied. This court has held the contrary. (See Point II, *post*, which is devoted to (1) a discussion of the circumstances under which the appointment of counsel is required in non-capital state cases and (2) the appropriate mode of establishing those circumstances, which we say is not by presumption from a naked common law record.)

Petitioners rely upon the following non-capital state cases: *House* v. *Mayo*, 324 U. S. 42; *Rice* v. *Olson*, 324 U. S. 786; *De Meerleer* v. *Michigan*, ..., U. S. ...., 67 S. Ct. 596; *Canizio* v. *New York*, 327 U. S. 82. *Each one* of these cases was, under the governing state procedure, a proceeding contemplating *de novo* investigation of matter *dehors* the common law record. In *each one* of these cases, the convicted prisoner alleged special circumstances showing actual prejudice. In *each one* of these cases a hearing was denied on the merits. In each one of these cases, this court predicated its decision on the special circumstances, alleged in a proceeding in which allegations of fact was proper, the allegations being undenied and therefore admitted. In each case the court said that the *particular circumstances* alleged were sufficient to show a denial of due process. We summarize the special circumstances in each case, respectively, in the margin.[5]

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[5] *Rice* v. *Olson*, 324 U. S. 786: In this case petitioner was an Indian and it was made affirmatively to appear that there was an exceedingly difficult question, involving the reconciliation of conflicting rights of sovereignty with respect to whether the *locus* of the crime was within the exclusive federal criminal jurisdiction. The court emphasized "the complexities of the problem" and found it pertinent to observe that "a decision of the state court that it had jurisdiction might not have finally determined the issue."

Canizio v. *New York*, 327 U. S. 82: In this case the defendant was nineteen years old, therefore presumed by the common law to be incapable of making even the simplest contract, and made an affirmative showing by affidavit, that he was "unfamiliar with his legal rights." Even then the court affirmed the conviction on the ground that counsel who later represented him waived his right, if right he had, to vacate the judgment. But in discussing what the situation would have been

Not one of these cases declares or, we submit, fairly intimates that on a mere common law record, showing an acknowledgment of guilt of a simple type of crime and not suggesting that there was either special circumstance or injustice in the receiving of such acknowledgment of guilt, there is such a right of counsel that the State reviewing court must reverse *for a new trial on the issue of guilt* or this court will.

We emphasize the words "reverse for a new trial *on the issue of guilt*," as distinguishing the issue from one as to a hearing on the issue of whether the plea was understand-

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"had there been nothing to contradict petitioner's general allegation that he was not represented by counsel in the interim between his plea of guilty and the time he was sentenced," this court said only that *"his charge would have been such as to require the court to hold a hearing on his motion."* The court did *not* hold that he was entitled to an *outright reversal* upon the common law record.

Tomkins v. *Missouri*, 323 U. S. 485 and the companion case, *Williams* v. *Kaiser*, 323 U. S. 471: In these cases, although the offenses were both capital, the petitioners made affirmative showings *contemplating the hearing of evidence on the issues tendered by those allegations* that they were incapable of making a defense.

Adams v. *United States*, 317 U. S. 269: The Circuit Court of Appeals issued an "auxiliary writ of *habeas corpus*" upon which writ evidence was taken *dehors* the record as to the competence of the accused to waive the right of counsel.

Powell v. *Alabama*, 287 U. S. 45: The record affirmatively showed and this court emphasized special circumstances consisting of the fact that the accused were negroes in a hostile white community, that there was substantial doubt as to their guilt, and that they were forced to trial without adequate preparation, as justifying reversal.

DeMeerleer v. *Michigan*, ... U. S. ..., 67 S. Ct. 596: The defendant asserted his rights by a proceeding contemplating an investigation of whether, *in that particular case*, due process was denied.

House v. *Mayo*, 324 U. S. 42: Here petitioner did not complain of failure to appoint counsel but of unreasonable failure to consult with counsel whom he already had. The court said: "We need not consider whether the state would have been required to appoint counsel for petitioner on the facts alleged in the petition." And it said this notwithstanding allegations of such "special circumstances" as that when petitioner was brought into court "without previous warning" and information was handed up making the charge of burglary, that he importuned the court for time to communicate and consult with an attorney whom he had already engaged, that he was "in his twenties, uneducated and a stranger in the town." In this case, with the fact undisputed that petitioner was not represented by counsel at the time of the trial, all that the court held that he was entitled to was a hearing upon his charge of denial of due process. There is no intimation that he would have been entitled to an outright reversal upon the common law record.

ingly made and whether special circumstances warrant the vacation of the judgment, because on writ of error in Illinois, the judgment must be one of affirmance, vacation of the judgment for trial, or discharge. Petitioners do not and cannot suggest that they cannot now obtain a hearing on the issue of whether they were actually or probably prejudiced on the particular facts of their case by simple application to the Illinois court asserting facts constituting or entailing prejudice. Their right to such a hearing is clear. (See Point II, *post.*)

II.

Even if due process required the appointment of counsel in this case unless the accused chose to dispense therewith, the case could not be reversed on the common law record on writ of error. Other remedies, original and not appellate in office and nature, are available in Illinois for the assertion of any rights that petitioners may have or claim.

Thus far neither this nor any other court has declared that absent particular circumstances of special prejudice, federal due process is denied by the mere failure to furnish counsel in a non-capital state case. Certainly no court has ever so held in cases where a plea of guilty was received. (See Point I, *ante,* and the cases there cited.) And even in capital cases, where life itself is at stake, this court has said that the accused may waive counsel if he does so intelligently and understandingly.

In *Johnson* v. *Zerbst,* 304 U.S. 458, this court, speaking through Mr. Justice Black, said, at pages 468-469:

> "• • • Where a defendant, without counsel, acquiesces in a trial resulting in his conviction and later seeks release by the extraordinary remedy of *habeas*

> *corpus*, the burden of proof rests upon him to establish that he did not competently and intelligently waive his constitutional right to assistance of counsel. * * *"

Carter v. *Illinois*, 329 U. S. 173, was a capital case. It came before the court on a common law record reciting that the court

> "fully explained to the defendant * * * the consequences of such plea, including the right to have a lawyer appointed by the Court to defend him"

and the right of trial. The record in the instant case does not, it is true, contain the verbiage, "including the right to have a lawyer appointed by the Court to defend him." But it does recite (R. 3) that the defendants

> "are advised of their rights of Trial and of the consequences of an entry of a plea of guilty * * *."

For aught that appears to the contrary, the crime was a simple one and the defendants freely acknowledged unlawful entry with intent to commit larceny, which are the only two essential elements of the crim .

True, we have said only, "For aught that appears to the contrary." But if the accused were actually prejudiced, they have in substance **the same remedy that was invoked in each of the cases relied upon by their counsel as most nearly similar to the instant case**, namely, application to the trial court upon charges of unfairness.

The Supreme Court of Illinois has specifically held that, *even in a misdemeanor case*, where the absence or even the mere inadequacy of counsel actually prejudices the accused, *coram nobis* is appropriate. (*People* v. *Green*, 355 Ill. 468.) This court has held that the Illinois Supreme Court need not entertain the claim of betrayal by appointed counsel (*White* v. *Ragen*, 324 U. S. 760) or even the absence of counsel in a capital case (*Carter* v. *Illinois*, 329

U. S. 173) where there is an adequate remedy by statutory proceedings in the nature of a writ of error *coram nobis*. And this court assumes that Illinois' remedy in that behalf is adequate. (*Woods* v. *Nierstheimer*, 328 U. S. 211; *White* v. *Ragen*, 324 U. S. 760; *Lutz* v. *Ragen*, 324 U. S. 760, a companion case to *White* v. *Ragen*, *id.*)

Petitioners assert, although only by extrajudicial interpolations written upon but forming no part of the record, that they were induced to plead guilty by a promise on the part of the State's Attorney. If this is true, petitioners have a very clear right under Illinois law to move to vacate the judgment against them. *People* v. *Bogolowski*, 317 Ill. 460, is directly in point. In that case the accused, having been promised leniency or immunity if he would plead guilty and testify against co-defendants, did plead guilty and did testify against them. He received a severe sentence in breach of the promise of leniency. He then made a motion to vacate the judgment and sentence, asserting his understanding with the State's Attorney. The Supreme Court of Illinois held that promises made by the State's Attorney to induce a confession and plea of guilty afforded clear grounds for vacating the judgment upon simple motion in the trial court. It reversed the trial court's denial of the motion.

If, therefore, petitioners' pleas of guilty were anything other than a simple acknowledgment of actual guilt of a charge to which they had no defense, or if their pleas were induced by false promises, or if the pleas were in fact due to a misunderstanding of petitioners' rights, they may do precisely what was done by Rice (*Rice* v. *Olson*, 324 U. S. 786), House (*House* v. *Mayo*, 324 U. S. 42), DeMeerleer (*De Meerleer* v. *Michigan*, . . . U. S. . . ., 67 S. Ct. 596) and McCann (*Adams* v. *U. S. ex rel. McCann*, 317 U. S. 269), namely, present a simple motion to the trial court suggest-

ing facts and circumstances that demonstrate, or at least raise a fair inference, of denial of due process.

III.

The record fails to show or to support a fair inference that the prisoners had "special need for advice of counsel because of the difficult legal questions involved" or were "unconstitutionally rushed through trial."

Petitioners' counsel makes the charge, which would be most serious if it were supported by the record, that "The petitioners were not advised of their right to counsel, did not waive this right, and despite their special need for advice of counsel because of the difficult legal questions involved, their conviction and sentencing were hurried through without any assistance of counsel." (*Petitioners' Br.*, caption to Point I, p. 8.)

At page 12 of petitioners' brief, their counsel summarizes in a subcaption his contention that "petitioners were rushed through trial on serious offenses without opportunity for reflection or consideration."

If this court rejects the considerations developed in Point I of this brief, *ante*, retracts its declaration in *Adams* v. *United States*, 317 U. S. 269, that to hold that

> "a layman cannot plead guilty unless he has the opinion of a lawyer on the questions of law that might arise if he did not admit his guilt" would be "a gratuitous dislocation of the processes of justice.",

overrules *Betts* v. *Brady*, 316 U. S. 455, rejects the traditions of state jurisprudence (*Appendix*), and holds that counsel must be appointed in *all* non-capital cases, even those involving only simple entry with intention to steal, then we concede that it makes no difference whether *these*

particular petitioners did or did not have, in their counsel's language, "special need for advice of counsel."

In short, if the court sets at naught the tradition of over half the states of the Union and declares categorically that in *all* serious crimes the accused must have counsel before entering a plea of guilty (unless the same is understandingly waived), the facts recited in the particular record will be the details of a single case and irrelevant in the face of such a general principle of constitutional law.

But if this court adheres to its view that the question of due process *vel non* in cases such as this depends upon the particular circumstances of each case, then the following observations upon the present record are important and, we submit, decisive:

Petitioners were accused of the crime of burglary by an indictment orthodox in form. Therefore, the fact that the text of the indictment was technical is not a special circumstance. They were charged with a crime that is simple in its *genus*. It was, so far as the record discloses or intimates, the simple crime of unlawfully entering the dwelling house of one J. V. Shaver with intent to steal and with actually stealing $5 belonging to Shaver.

They acknowledged their guilt of this crime in open court by a simple plea of guilty.

Of course, we admit that a charge of burglary *can* involve very intricate, indeed highly abstruse questions of law. For instance, one entering a banking house in Illinois with intent to enter into a highly complicated financial transaction might or might not be guilty of burglary depending upon whether the transaction, in all of its complexities and ramifications, would, if consummated, amount to a crime that Illinois deems felonious. Certainly, in such a case counsel, even widely experienced and erudite counsel, might be necessary.

So, too, identification of the culprit in even a simple act of burglary might require difficult applications of such sciences as finger printing, the chirography of questioned documents, or the like. In any such cases such decisions of this court as *Rice* v. *Olson*, 324 U. S. 786, are conclusive that the reception of an accused's plea of guilty (unless, perchance, the accused is more than ordinarily sophisticated, cf. *Adams* v. *United States*, 317 U. S. 269), without appointing counsel, denies due process.

But, we repeat, the cardinal questions in this case are, as we stated at pages 2 and 3, *ante*, *first*, whether due process requires the appointment of counsel in *all* non-capital state cases or only in those in which "special circumstances" are present; and *second*, if the latter, then whether such "special circumstances", upon a record silent as to the point, must be presumed to have existed or must be established by *de novo* proceedings such as *habeas corpus*, *coram nobis* or other original *nisi prius* proceedings.

If the historical view of the question is to prevail, then we think it is decisive that at the time that the plea was received the trial court had no discretion to impose any sentence other than the one that in fact it did impose. Therefore, there was not even authority, much less occasion, for a "trial." The accused were, in substance, asked whether they were guilty of the offenses of breaking with intent to steal and stealing, pleaded guilty to the charge and received the only sentence possible upon such a plea. There was no occasion either for delay or protracted proceedings.

If, as we contend and as this court has always held, "special circumstances" are necessary to require the appointment of counsel in non-capital cases simple in *genus*, then certainly Illinois may determine whether the existence of such circumstances will be presumed upon a common law

record or whether they must be shown either by a bill of exceptions or by evidence *aliunde* the record by such appropriate and readily available state remedies as *coram nobis* or the post conviction motion made in the case of *People* v. *Bogolowski*, already cited and discussed, 317 Ill. 460.

Conclusion.

For the reasons developed in this brief, it is submitted that the judgment of the Supreme Court of Illinois should be affirmed.

Respectfully submitted,

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APPENDIX.

Study of the Right to Counsel in State Criminal Cases.

The following decisions hold or state that a failure to request counsel operates as a waiver of the right to counsel:

Alabama: *Mackreth* v. *Wilson*, 31 Ala. App. 191, 15 So. (2d) 112, Cert. den. 15 So. (2d) 114; California: *People* v. *Looney*, 9 Cal. App. (2d) 335, 49 P. (2d) 889; *Davis* v. *Crowder*, 78 P. (2d) 1039; Florida: *Weatherford* v. *State*, 76 Fla. 219, 79 So. 680; Georgia: *Rowland* v. *State*, 72 Ga. App. 793, 35 S. E. (2d) 372, 375; *Gatlin* v. *State*, 17 Ga. App. 406, 878 E. 151; *Gatlin* v. *State*, 87 S. E. 151, 17 Ga. App. 406; Idaho: *State* v. *Athens*, (1922), 36 Ida. 224, 210 P. 133, 134; Illinois: *People* v. *Fuhs*, 390 Ill. 41; *People* v. *Corbett*, 387 Ill. 41; *People* v. *Lavendowski*, 326 Ill. 173; *People* v. *Batey*, 392 Ill. 390; *People* v. *Parcora*, 358 Ill. 448; Indiana: *Loucks* v. *State*, 213 Ind. 108, 11 N. E. (2d) 694; Iowa: *Korf* v. *Jasper Co.* (1906), 132 Ia. 682, 108 N. W. 1031, 1032; Kansas: *Jones* v. *Amrine*, 154 Kan. 629, 121 P. (2d) 263; *Loftis* v. *Amrine*, 152 Kan. 464, 105 P. (2d) 890; *Ollen* v. *Amrine*, 127 P. (2d) 475, 155 Kan. 703; Kentucky: *Hamlin* v. *Commonwealth*, 287 Ky. 22, 152 S. W. (2d) 297; *Turner* v. *Commonwealth*, 89 Ky. 78, 1 S. W. 475; *Grogan* v. *Commonwealth*, 222 Ky. 482, 1 S. W. (2d) 779; *Holland* v. *Commonwealth*, 455 S. W. (2d) 476, 241 Ky. 813; Louisiana: *State* v. *Davis*, 171 La. 449, 131 So. 295; *State* v. *Murray* (1928), 165 La. 653, 115 So. 813; *State* v. *Sims*, 42 So. 494, 117 La. 1035; Michigan: *People* v. *Fries*, 294 Mich. 382, 293 N. W. 689; *People* v. *Haddad*, 306 Mich. 556, 11 N. W. (2d) 240, 241; Mississippi: *Dugan* v. *State*, 151 Miss. 781, 119 So. 298; Missouri: *State* v. *Miller*, ... Mo. ..., 292 S. W. 440, 442; *State* v. *Terry*, 201 Mo. 697, 100 S. W. 432; Montana: *State* v. *Fowler*, 196 P. 992; Nebraska: *Alexander* v. *O'Grady*, 137 Nebr. 645, 290 N. W. 718; *Davis* v. *O'Grady*, 137 Nebr. 708, 291 N. W. 82, 86; Ex Parte Tail, 145 Nebr. 268, 16 N. W. (2d)

161, 162; NEVADA: *State* v. *Mackinnon*, 168 P. 330, 41 N. W. 82; NEW JERSEY: *State* v. *Murphy*, 87 N. J. L. 515, 94 A. 640; *State* v. *Raney*, 63 N. J. L. 363, 43 A. 677; NEW YORK: *People* v. *Price*, 262 N. Y. 410, 187 N. E. 298, 300; PENNSYLVANIA: *Commonwealth* v. *Smith*, 344 Pa. 41, 24 Atl. (2d) 1; *Commonwealth* v. *Smith*, 147 Pa. Super. 423, 24 Atl. (2d) 724; *Commonwealth* v. *Burke*, 158 Pa. Super. 87, 43 Atl. (2d) 921; *Commonwealth* v. *Smith*, 158 Pa. Super. 104, 43 A. (2d) 906; *Commonwealth* v. *Ashe*, 141 Pa. Super. 408, 15 A. (2d) 409; *Commonwealth ex rel. Piccerelli* v. *Smith*, 27 A. (2d) 484; SOUTH CAROLINA: *State* v. *Jones*, 172 S. E. 129, 173 S. E. 77; TEXAS: *Brown* v. *State*, 118 Tex. Cr. R. 582, 40 S. W. (2d) 118; *Brady* v. *State*, 122 Tex. Cr. R. 275, 54 S. W. (2d) 513, 514; VIRGINIA: *Wilkinson* v. *Youell*, 180 Va. 321, 238 E. (2d) 356, 359; *Barnes* v. *Commonwealth* (1895), 92 Va. 794, 23 S. E. 784, 787; WEST VIRGINIA: *State* v. *Yoes* (1910), 67 W. Va. 546, 547, 68 S. E. 181; WYOMING: *James* v. *State* (1921), 27 Wyo. 378, 196 P. 1045.

The following decisions hold that there is a waiver of the right to counsel where the defendant pleads guilty to a non-capital criminal case and fails to request counsel:

GEORGIA: *Rowland* v. *State*, 72 Ga. App. 793, 35 S. E. (2d) 372, 375; KANSAS: *Jones* v. *Amrine*, 154 Kan. 629, 121 P. (2d) 263; *Loftis* v. *Amrine*, 152 Kan. 464, 105 P. (2d) 890; MICHIGAN: *People* v. *Fries*, 294 Mich. 382, 293 N. W. 689; NEBRASKA: *Alexander* v. *O'Grady*, 137 Nebr. 645, 290 N. W. 718; *Davis* v. *O'Grady*, 137 Nebr. 708, 291 N. W. 82, 86; *Ex Parte Tail*, 145 Nebr. 268, 16 N. W. (2d) 161, 162; PENNSYLVANIA: *Commonwealth* v. *Ashe*, 141 Pa. Super. 408, 15 A. (2d) 409; VIRGINIA: *Wilkinson* v. *Youell*, 180 Va. 321, 23 S. E. (2d) 356, 359.

Constitutional and Statutory Provisions of the Various States Relating to Right of Counsel.

ALABAMA:

Title 15, Section 318, Alabama Code 1940. Unless the prisoner is charged with a capital offense, the court is not required to appoint counsel for him.

Code of Alabama 1940, Title 15, Paragraph 318 Article 2.

> "*Appointing counsel to defend.*—When counsel appointed for defendant in capital cases * * * if the defendant is indicted for a capital offense, and is unable to employ counsel, the court must appoint counsel for him, not exceeding two, who must be allowed access to him, if confined, at all reasonable hours."

This section requires only that courts shall appoint counsel for a defendant who is indicted for a capital offense, and who is unable to employ counsel. This has been the extent of the duty enjoined upon trial courts, with respect to appointment of attorney for defendants, since the earliest history of the state. *Gilchrist* v. *State*, 234 Ala. 73, 74, 173 So. 651. See *Bethune* v. *State*, 26 Ala. App. 72, 153 So. 892.

ARIZONA:

Arizona Code Annotated 1939, Chapter 44, Section 44-904.

> "*Right to counsel on arraignment—duty and privilege of counsel—substitutions of counsel—effect of failure to assign.*—Before the defendant is arraigned on a charge of felony if he is without counsel, the court shall, unless the defendant objects, assign him counsel to represent him in the cause. Counsel so assigned shall serve without cost to the defendant, and shall have free access to the defendant, in private, at all reasonable hours while acting as counsel for him. Assignment of counsel shall not deprive the defendant of the right to engage other counsel at any stage of

the proceedings in substitution of counsel assigned him by the court. Failure to assign counsel before arraignment shall not affect the validity of any proceeding in the cause, if it appear that the defendant was subsequently represented by counsel whether assigned to him or of his own choosing and that the defendant was not in fact prejudiced by such failure."

ARKANSAS:

Constitution, Art. II, sec. 11, provides that in all criminal prosecutions the accused has a right to be heard by himself and counsel.

Pope's Digest of the Statutes of Arkansas, Ch. 43, sec. 3877, on the assignment of counsel, provides:

"If any person about to be arraigned upon indictment for a felony be without counsel to conduct his defense, and shall be unable to employ any, it shall be the duty of the court to assign him counsel at his request, not exceeding two * * *."

The Supreme Court of Arkansas has refused to review the contention of an accused that he was deprived of counsel when the record does not show that he requested the court to assign counsel nor any disinclination on the part of the court to discharge its duty in that respect. *Brown v. State*, 12 Ark. 623.

This section partially supersedes Paragraph 44-905.

"*Right of counsel—fees for services.*—If the defendant appeals for arraignment without counsel, he shall be informed by the court that it is his right to have counsel before being arraigned, and shall be asked if he desires the aid of counsel; if he desires counsel and declares upon examination by the court, under oath, that he has no means to employ the same, the court, in its discretion, may assign one (1) or more attorneys at law to that duty."

Right to appear and defend by counsel, Const., Art. 2 Par. 24.

CALIFORNIA:

Paragraph 987, Penal Code of California, Deering 1941.

"*Defendant on arraignment, to be informed of his right to counsel: When court to assign counsel.* If the defendant appears for arraignment without counsel, he must be informed by the court that it is his right to have counsel before being arraigned, and must be asked if he desires the aid of counsel. If he desires and is unable to employ counsel, the court must assign counsel to defend him."

(Enacted 1872) Constitutional provisions: Const., Art. I, Par. 13; U. S. Const., Amdt. VI.

Paragraph 858.

"*Magistrate to inform the defendant of the charge, and his right to counsel.* When the defendant is brought before the magistrate upon an arrest, whether with or without warrant, on a charge of having committed a public offense, the magistrate must immediately inform him of the charge against him, and of his right to the aid of counsel in every stage of the proceedings."

(Enacted 1872)

Paragraph 859.

"*Defendant to be taken before magistrate of superior court: delivery of copy of complaint and informed of right to counsel officer to take message to counsel without delay or fee.* When the defendant is charged with the commission of a public offense, over which the superior court has original jurisdiction, by a written complaint subscribed under oath and on file in a court within the county in which the public offense is triable, he shall, without unnecessary delay, be taken before a magistrate of the court in which such complaint is on file. The magistrate shall immediately deliver to him a copy of the complaint, inform him of his right to the aid of counsel, ask him if he desires the aid of counsel, and allow him a reasonable time to send for counsel; and the magistrate must,

upon the request of the defendant, require a peace officer to take a message to any counsel whom the defendant may name, in the city or township in which the court is situated. The officer must, without delay and without fee, perform that duty."

(Enacted 1872; Am. Stats. 1927, p. 1044; Stats. 1935, p. 492.)

COLORADO:

Colorado Statutes Annotated, Chapter 48, Paragraph 502.

"On indictments or information for crimes or misdemeanors in any of the district courts of this state where by reason of the inability of the defendant or defendants to employ counsel, the court may assign him or them counsel for his or their defense. It shall be the duty of the court so assigning counsel to allow him a fee, to be fixed by the judge of the court, to be paid out of the county treasury of the county wherein such indictment or information may be found."

Note: The statute cited provides "the court may assign him counsel, etc." and this would seem to be directive rather than mandatory. However, there are no Colorado cases interpreting directly the courts' duty under the the statute and the extent of its discretion in refusing to appoint counsel.

CONNECTICUT:

Art. I, sec. 9, of the Connecticut Constitution provides that an accused "shall have the right to be heard by himself and by counsel in criminal prosecutions."

Ch. 335, sec. 6476, General Statutes of Connecticut, Division of 1930, provides for the appointment by the court of a public defender whose duty it is to act as an attorney in defense of any defendant without funds sufficient to employ counsel of his own choice.

DELAWARE:

Art. I, sec. 7, of the Delaware Constitution provides that "in all criminal prosecutions the accused hath a right to be heard by himself and his counsel."

Revised Code of Dela. 1935, Sec. 4310, provides:

"* * * the said court (the court of General Sessions within the several counties) may assign counsel to any person on trial for any offense which is a felony."

FLORIDA:

Constitution, Section 11. Declaration of rights.

"In all criminal prosecutions, the accused * * * shall be heard by himself or counsel or both * * *."

General Statutes, 1906 Section 3969; Florida Compiled Laws, 1914.

"If any person shall be indicted for a felony or a misdemeanor or after an information shall be filed against him * * *, the court shall cause him to be arraigned and tried at the same term, unless good cause be shown for continuance and shall allow him counsel to assist him in his trial if he desires it."

Note: In *Weatherford* v. *State,* 79 So. 680 held:

"failure of trial judge to ask accused if he desired counsel or was unable to employ counsel did not warrant reversal."

Florida Revised Statutes 1941, Paragraph 909.21.

"*Appointment of counsel in capital cases.*—In all capital cases where the defendant is insolvent, the judge shall appoint such counsel for the defendant as he shall deem necessary, and shall allow such compensation as he deem reasonable, such sum to be paid by the county in which the crime was committed."

GEORGIA:

Park's Annotated Code of 1914, Volume 6, Penal Code. Paragraph 8, Section 8.

"*Benefit of Counsel.* Every person charged with an offense against the laws of this state * * *" Const. Art. I, Sec. 1 Par. 5 (Secs. 6361, C. C.)

Constitution:

"No person shall be deprived of the right to prosecute or defend his own cause in any of the courts of this state in person, by attorney or both."

Civil Code, Section 6360.

Note: In *Gatlin* v. *State,* 87 So. 151 held, not error when court did not inform defendant of his constitutional right to have benefit of counsel.

IDAHO:

Section 8621.

"In a criminal act the defendant is entitled:

1. To a speedy and public trial.

2. To be allowed counsel as in civil action, or to appear and defend in person and with counsel."

State v. *Athens,* 210 Pac. 133 held:

"The fact, the defendant in a criminal case was not represented by counsel on the arraignment is not ground for setting aside an order continuing the case for the term. Defendant must request and be refused the right to have counsel."

Idaho Code Annotated 1932.

Section 19-1412.

"*Right to counsel.* If the defendant appears for arraignment without counsel he must be informed by the court that it is his right to have counsel before being arraigned, and must be asked if he desires the aid of counsel. If he desires and is unable to employ counsel the court must assign counsel to defend him."

Section 19-1413.

"*Appointment of counsel for accused.* Whenever, upon the trial of a person, in the district court, upon an information, or indictment, it appears to the satisfaction of the court that the accused is poor and unable to procure the services of counsel, the court may appoint counsel to conduct the defense of the accused, for which services such counsel must be paid out of the county treasury, upon order of the judge of the court, such sum as the court may deem reasonable for the services rendered."

"Action of court in not advising defendant of his right to counsel, or asking him if he desired or was not able to employ counsel, but instead instantly assigning him such and fixing date for plea on the same day is not compliance with terms of statute which are mandatory."

State v. *Poglianich,* 43 Idaho 409, 252 Pac. 177.

ILLINOIS:

The rights to an accused in Illinois are discussed in the brief proper.

INDIANA:

Louks v. *State,* 213 Ind. 108, 11 N. E. (2d) 694.

In this case, the court held that the test of whether or not defendant was deprived of right to counsel depends on whether or not he entered his plea of guilty, "freely and understandingly."

In *Rhodes* v. *State,* the Indiana court says:

"This court has expressed disapproval of trial courts receiving pleas of guilty from defendants charged with serious crime, who are not represented by counsel, until after reasonable inquiry into the facts to discover whether a plea of guilty is entered freely and understandingly."

Indiana, in our opinion, does not infer waiver from a plea of guilty or, at least, there is no such necessary inference. The court, when deciding whether waiver has been made, examines carefully the charge or indictment and sees whether the accused, as a person of ordinary intelligence, could comprehend exactly what Acts he is charged with, etc.

IOWA:

Iowa Code 1939, Chaper 640, Paragraph 13773:

> "*Right to counsel.* If the defendant appears for arraignment without counsel, he must, before proceeding therewith, be informed by the court of his right thereto, and be asked if he desires counsel; and if he does, and is unable to employ any, the court must allow him to select or assign him counsel, not exceeding two, who shall have free access to him at all reasonable hours."

KANSAS:

The cases, *Loftis* v. *Amrine*, 152 Kan. 464, 105 Pa. (2d) 590, and *Jones* v. *Amrine*, 154 Kan. 629, 121 Pa. (2d) 263 held that under the statutes then in force, the trial court was not required to appoint counsel in non-capital cases in the absence of a request by the accused.

General Statutes 1935, 62-1304 in *Jones* v. *Amrine* held, accused who entered plea of guilty and made no request for counsel was not denied right to counsel because trial court did not advise him as to circumstances under which he might have been entitled to have counsel assigned.

The statutes under which these cases were decided read as follows: General Statute 1935, 62-1304.

> "If any person about to be arraigned upon an indictment or information for felony be without counsel to conduct his defense, and be unable to employ any, it shall be the duty of the court to assign him counsel at

his request, not exceeding two, who shall have free access to the prisoner at all reasonable hours."

This is not the Kansas law at the present time, as the 1935 statutes were replaced in 1941 by the following statute. General Statutes 1945, 62-1304.

> *"Counsel for accused; appointment, when; record of proceeding; privilege and duties of counsel; fee paid by county, when.* If any person about to be arraigned upon an indictment or information for any offense against the laws of this state, be without counsel to conduct his defense, it shall be the duty of the court to inform him that he is entitled to counsel, and to give him an opportunity to employ counsel of his own choosing, if he states that he is able and willing to do so. If he does ask to consult counsel of his own choosing, the court shall permit him to do so, if such counsel is within the territorial jurisdiction of the court. If he is not able and willing to employ counsel, and does not ask to consult counsel of his own choosing, the court shall employ counsel to represent him, unless he states in writing that he does not want counsel to represent him and the court shall find that the appointment of counsel over his objection will not be to his advantage. A record of such proceeding shall be made by the court reporter, which shall be transcribed and reduced to writing by the reporter, who shall certify to the correctness of such transcript, and such transcript shall be filed and made a part of the files in the cause."

The effect of this statute is not certain. *See Garrison* v. *Amrine,* 126 P. (2d) 228.

Accused may waive right to counsel by written instrument. *State* v. *Perkins,* 156 K. 323, 325, 133 P. (2d) 160.

KENTUCKY:

Bills of Rights, sec. 11, of the Kentucky Constitution provides that "in all criminal prosecutions the accused has the right to be heard by himself and counsel."

The Kentucky Supreme Court has held that a court need not assign counsel to an accused under Kentucky law unless he requests it and shows financial ability or lacks mental capacity to understand or conduct a defense. *Holland* v. *Commonwealth*, 241 Ky. 813, 45 S. W. (2d) 476; *Hamlin* v. *Commonwealth*, 287 Ky. 22, 152 S. W. (2d) 297; *Moore* v. *Commonwealth*, 298 Ky. 14, 181 S. W. (2d) 297.

LOUISIANA:

Article I, sec. 9 of the Louisiana Constitution provides for the right to be heard in criminal prosecutions by counsel.

Dart's Criminal Stats., sec. 602 provides:

> "Every person shall be allowed to make his defense by counsel learned in the law; and the court before whom he shall be tried or some judge thereof, shall immediately upon his request assign to him such counsel as he shall desire."

It has been held that the Louisiana court need not appoint counsel unless request is made. *State* v. *Davis*, 171 La. 449.

MAINE:

Declaration of Rights, sec. 6, of the Maine Constitution provides: "In all criminal prosecutions the accused shall have a right to be heard by himself and his counsel or either at his election.

MARYLAND:

Declarations of Rights, Art. 21, of the Maryland Constitution, provides that in a criminal prosecution every man has a right "to be allowed counsel."

The federal district court, has held that when a defendant pleaded guilty voluntarily and without improper induce-

ment insofar as Maryland law is concerned, the accused has waived the right to an appointment of counsel. *Gall* v. *Brady*, 39 Fed. Supp. 504, aff'd. 125 Fed. (2d) 253.

MASSACHUSETTS:

General Laws of Massachusetts 1932, Chapter 277, Section 47 and 48.

Section 47.

"If a prisoner, under indictment for a capital crime, pleads guilty, upon being arraigned, the court shall award sentence against him; if he does not plead guilty, the court may assign him counsel and take all other measures preparatory to a trial, which shall, subject to Section 72, be held as soon after the finding of the indictment after other official duties of the justices will admit and the circumstances of the cases require."

Section 48.

"If a defendant, in a capital case, does not plead guilty upon being arraigned before a district court or trial justice, the superior court may assign him counsel upon his petition, and upon certification to the superior court of the record of the arraignment and plea by the clerk of the district court, or by the trial justice before whom the arraignment was held. The case shall, thereupon be continued until the assignment of counsel has been made and certification thereof received by the clerk of the district court or by the trial justice."

MICHIGAN:

Compiled Laws Michigan 1929, Chapter III, Section 17129.

"*Right of accused; hearing by counsel, defense, confronting witnesses.* Section 1. On the trial of every indictment, or other criminal accusation, the party accused shall be allowed to be heard by counsel and may defend himself, and he shall have a right to pro-

duce witnesses and proofs in his favor, and meet the witness who are produced against him face to face."

Constitution II, 19.

Compiled Laws of Michigan 1929, Chapter III, Section 17129.

"Appointment of counsel for accused is discretionary with court and one who pleads guilty is not entitled to such appointment."

People v. *Harris,* 266 M 317, 253 N. W. 312.

Constitutional provisions securing to an accused right to have assistance of counsel have been held not applicable where one confesses to crime and pleads guilty without requesting assistance of counsel. *People* v. *Crandell,* 270 Mich. 124, 258 N. W. 224.

MINNESOTA:

Minnesota Statutes 1945, Chapter 630, Section 630.10.

"*Defendant informed of his right to counsel.* If the defendant shall appear for arraignment without counsel, he shall be informed by the court that it is his right to have counsel before being arraigned, and shall be asked if he desires the aid of counsel."

The statute was not followed formally, but the court substantially informed the defendant of his right to counsel. *State* v. *McDonnell,* 165 M 425, 206 N. W. 952.

MISSISSIPPI:

Code 1930 Annotated, Chapter 21, Section 1262.

"*In capital cases, copy of indictment and special venire served to be given—counsel permitted.*—Any person indicted for a capital crime shall, if demanded by him, by motion in writing, before the completion of the drawing of the special venire, have a copy of the indictment and list of special venire summoned for his trial, delivered to him or his counsel, at least, one en-

tire day before said trial. And person in jail charged with a direct capital crime, or who is indicted for such crime, and who is unable to employ counsel, shall, at his request, be allowed counsel not exceeding two, to be sworn by him by the judge in vacation or by the court, to defend him in the circuit court, upon the trial of such charge, and such counsel selected and appointed by the judge or court shall have free access to the prisoner, who shall have process to compel the attendance of witness in his favor."

No duty to assign counsel in non-capital cases. *Reed* v. *State*, 143 Miss. 686, 109 S. 715.

MONTANA:

Revised Codes of Montana 1935 Annotated, Chapter 73, Section 11886.

"*Right to counsel on arraignment.* If the defendant appear for arraignment without counsel, he must be informed by the court that it is his right to have counsel before being arraigned, and must be asked if he desires the aid of counsel. If he desires and is unable to employ counsel, the court must assign counsel to defend him."

See State v. *Murphy*, 68 M 427, 429, 219 P 629.

MISSOURI:

The trial court is required to assign counsel on request.

Missouri Rev. Stats. Anno., Section 4003.

NEBRASKA:

Compiled Statutes of Nebraska 1929, Chapter 29, Article 18.

Section 29-1803.

"*Court to assign counsel for accused, when, counsel fees audited and allowed by court, public defender.*

> The court before whom any person shall be indicted for any offense which is capital, or punished by imprisonment in the penitentiary, is hereby authorized and required to assign to such person counsel, not exceeding two, if the prisoner has not the ability to procure counsel, and they shall have full access to the prisoner at all reasonable hours."

The constitutional right of accused to have assistance of counsel may be waived and a waiver may be implied where the accused being without counsel fails to demand an attorney to counsel him. *Ex Parte Tail,* 16 N. W. (2d) 161.

NEVADA:

122 Pac. (2d) 862, *Ex Parte Kramer.*

NEW HAMPSHIRE:

Bill of Rights, Fifteenth, formulates the right of an accused to be heard "by himself and counsel."

New Hampshire Rev. Laws 1942, Ch. 428:

Capital Cases, sec. 1, provides in substance, that counsel to be assigned the accused by the court *at his request* if accused is poor and unable to defray the expense of procuring their attendance.

Other Cases, sec. 2:

> "Any person held to the grand jury charged with any other offense the punishment whereof may be three years' imprisonment, is entitled to have counsel assigned him by the court if *the court shall be of the opinion* that he is poor and unable to defray the expense of procuring their attendance." (Emphasis added.)

NEW JERSEY:

Revised Statutes of New Jersey 1937, Chapter 190, Section 2:190-3.

"*Counsel for accused; compensation—homicide cases.* The court before which any person tried upon indictment shall, if he is not able to procure counsel, assign to him counsel, not exceeding two, who shall have free access to such prisoner at all reasonable hours."

NEW MEXICO:

Constitution, Art. II, sec. 14, asserts the right of an accused to "appear and defend in person and by counsel."

New Mexico Statutes 1941, Crim. Procedure, sec. 42-1102, provides that the court is authorized and required to assign counsel to an accused charged with any offense which is capital or punishable by imprisonment in the penitentiary if the accused has no means to procure counsel. No judicial decisions clearly establishing the right to have counsel assigned appear.

In *State* v. *Garcia*, 47 New Mex. 319, 142 Pac. (2) 552, defendant without counsel entered a plea of guilty to murder in the second degree. Although it does not appear whether accused came within the purview of the statute above, the court held that the defendant's contention was reduced to the proposition that an accused may not plead guilty except upon advice of counsel. The court held there was an intelligent waiver of the right to counsel and due process was satisfied.

NEW YORK:

Gilbert's Criminal Code 1927. Chapter IV, Section 308.

"*Defendant appearing for arraignment without counsel to be informed of his right to counsel.* If the defendant appearing for arraignment without counsel, he must be asked if he desires the aid of counsel,

and if he does the court must assign counsel. When services are rendered by counsel in pursuance of such assignment in a case where the offense charged in the indictment is punishable by death or on an appeal from a judgment of death, the court in which the defendant is tried or the action of the indictment is otherwise disposed of, or by which the appeal is finally determined, or the court in which an action is suspended or discontinued or otherwise disposed of on the ground that the defendant has been heretofore or is hereafter declared incompetent by a duly appointed commission, may allow such counsel his personal and incidental expenses upon a verified statement thereof being filed with the clerk of such court, and also reasonable compensation for his services in such court, not exceeding the sum of one thousand dollars."

See People v. *Youlio*, 154 N. E. 588. Defendant was not informed of his right on arraignment and pleaded guilty. Error disregarded. *See People* v. *Price*, 262 N. Y. 410, 187 N. E. 298.

NORTH CAROLINA:

General Statutes of North Carolina 1943, Chapter 15, Section 15-4.

"*Accused entitled to counsel.*—Every person accused of any crime whatsoever, shall be entitled to counsel in all matters which may be necessary for his defense. (Rev. S. 3150; Code, s 1182; R. C., c. 35, s 13; 1777, c 115, s 85; C. S. 4515. (1945 Cumulative Supplement).

Section 15-4.

"*Accused entitled to counsel. Right is a mandate in capital felony cases.* The right to have counsel as well as the right of confrontation is guaranteed."

Article I, Section 11, N. C. Const. Where the crime charged is a capital felony, this right becomes a mandate.

State v. *Farrell*, 223 N. C. 321, 327, 26 S. E. (2d) 322.

NORTH DAKOTA:

Constitution, Art. I, sec. 13, phrases the right of an accused "to appear and defend in person and by counsel."

North Dakota Revised Code 1943, Judicial Criminal Procedure, sec. 29.0127, provides:

> "In all criminal actions, when it is satisfactorily shown to the court that the defendant has no means and is unable to employ counsel, the court shall appoint and assign counsel for his defense. • • •"

It does not appear that there are any North Dakota cases interpreting expressly the court's duty under the statute and the extent of its discretion in appointing counsel.

OHIO:

Page's Annotated Ohio General Code: Chapter 18, Section 13439-2.

> "*Assigning counsel to defend.* After a copy of the indictment has been served or opportunity had for receiving it, as provided in the next preceding section, the accused shall be brought into court, and if he is without and unable to employ counsel, the court shall assign him counsel, not exceeding two, who shall have access to such accused at all reasonable hours."

OKLAHOMA:

The Oklahoma Constitution, Art. II, sec. 20, phrases the right of an accused as that to be heard "by himself and counsel."

Oklahoma Stats., Title 22, Ch. 7, sec. 464:

> "If the defendant appear for arraignment, without counsel, he must be informed by the court that it is his right to have counsel before being arraigned and must be asked if he desire the aid of counsel. If he desires, and is unable to employ counsel, the court must assign counsel to defend him."

The Oklahoma courts have held the above statute applicable to every person accused of a felony. In *Ex Parte Barnett* (1939), 67 Okla. Criminal Rep. 300, 94 P. (2) 18, the Appellate Court ordered the prisoner discharged under this statute for failure of the trial court to inform him it was the court's duty to appoint counsel if he had no means.

However, the following cases of *Ex Parte Robnett* (1940), 69 Okla. Crim. Rep. 235, 101 P. (2) 645; and *Ex Parte Pennington* (1941), 71 Okla. Crim. Rep. 263, 110 P. (2) 923, although the courts in these cases affirmed their right under proper conditions to discharge defendants, they remanded them instead to the trial court to proceed as if there had been no arraignment.

OREGON:

Constitution, Art. I, sec. 11, phrases the right of an accused to be heard "by himself and counsel."

Compiled Laws, Penal Code, sec. 26-803, provides that if a defendant appear for arraignment without counsel he must be informed by the court that it is his right to have counsel before being arraigned and must be asked if he desires the aid of counsel.

Section 26-804 provides, in substance, that whenever it shall appear upon arraignment of a person accused of a crime against the State of Oregon that such person is without funds and unable to retain his or her own counsel, the court, upon request of the accused, appoint suitable counsel.

That the court at the time of arraignment inform the accused of his right to counsel guaranteed him by the laws of the state will be presumed on appeal where the judgment is silent on such matters. An affirmative recitation that there was compliance with the above statutes is not neces-

sary. It is presumed that the requirements were observed by the court. *Ex Parte Loundagin* (1929), 129 Ore. 652, 278 P. 950.

PENNSYLVANIA:

Commonwealth v. *Valerio*, 178 Atl. 509, 118 Pa. Super 34; Conviction without informed of right to be represented by counsel—held reversal by error. *Commonwealth* v. *Cohen*, 186 Atl. 203, 123 Pa super 5. See also *Commonwealth* v. *Haas*, 141 Pa Superior 408, 15 Atl. (2d) 409, held no duty to appoint counsel if pleaded guilty.

RHODE ISLAND:

Constitution, Art. I, sec. 10, provides that in all criminal prosecutions an accused has the right to have assistance of counsel in his defense.

General Laws, Ch. 625, sec. 62:

> "The superior court may appoint, whenever occasion may require, one or more attorneys to conduct the defense of any indigent person charged with any offense against the laws of the State."

This statute is but permissive and the appointment of counsel in all cases rests in the sound discretion of the court. (*State* v. *Hudson*, 55 R. I. 141, at 152.)

SOUTH CAROLINA:

Laws of South Carolina, 1942, Code Crim. Proc. sec. 980, provides that in capital offenses:

> "• • • in case any person so accused or indicted shall desire counsel the court is authorized and required, immediately upon his request, to assign to such person such, and so many counsel not exceeding two as the presiding judge shall designate, • • •."

In *State* v. *Jones*, 172 S. C. 130, 173, S. E. 77, where defendants were convicted of a non-capital offense, the court held that the trial court was not required to assign counsel for defendants not represented by attorneys.

SOUTH DAKOTA:

Vol. II, South Dakota Code of 1939, Ch. 35.29, sec. 34.2905, provides that a defendant in a criminal action has the right to defend in person and by counsel.

Ch. 34.19, secs. 34.1901 and 34.1902, provide that any criminal court shall appoint counsel for a defendant when it is satisfactorily shown that the defendant is without means to employ counsel.

Ch. 34.23, sec. 34.2302, requires that a trial judge fully advises a person of his rights before permitting entry of a plea of guilty.

In *State* v. *Haas*, 69 S. D. 204, in holding that a petitioner who refused the aid of counsel and pleaded guilty to a felony was entitled by the due process clause of the Fourteenth Amendment to a hearing on the question of whether or not he had intelligently waived counsel upon a showing by the defendant through his counsel that he was without sufficient power of mind in understanding to make an intelligent waiver of his rights, said with reference to the requirement of counsel by that state's constitution:

> "We do not now decide whether the aid of counsel to one charged with crime is of the essence of due process under our State constitution. We do decide and hold that lack of such a fair trial, as the due process provisions require, may arise from lack of counsel that for such a waiver of the right to defend by counsel to be binding on a defendant it must be made voluntarily and intelligently by a competent mind; and that proceedings in a capital case conducted without the aid of counsel should be scrutinized with the utmost of care."

TENNESSEE:

Constitution, Art. I, sec. 9, provides that an accused has a right to be heard by himself and by his counsel in all criminal prosecutions.

Williams Tenn. Code, sec. 11734, provides: If the accused is unable to employ counsel he is entitled to have counsel appointed by the court.

The only case found dealing with the court's duty under the statute and the discretion in refusing to him appointed counsel, is *Kizer* v. *State*, 80 Tenn. (12 L. E. A.), 564, 566, which holds that this right is subject to the control of the courts in the exercise of a sound judicial discretion.

TEXAS:

Constitution, Art. I, sec. 10, provides that the accused "shall have the right of being heard by himself, or counsel, or both."

Texas Code, Crim. Procedure 1925, Art. 3, Art. 494, provide:

> "When the accused is brought into court for the purpose of being arraigned, if it appear that he has no counsel and is too poor to employ counsel, the court shall appoint one or more practicing attorneys to defend him."

This statute applies only to capital cases, and it is only in cases of that character that the court is required to appointed counsel under it. *Moreno* v. *State* (Crim. App.), 26 S. W. (2d) 652. The court may appoint counsel in other cases as a matter of grace; the matter rests in the court's discretion and failure or refusal to do so is not ground for reversal. *Cummings* v. *State*, 104 Crim. Rep. 117, 282 S. W. 227.

The statute is mandatory in capital cases, but the right to have counsel appointed under it may be waived by a

failure to specifically requirest counsel. *Compton* v. *State*, 67 Crim. Rep. 15, 148 S. W. 581; *State* v. *Jones*, 172 S. W. 129, 173 S. W. 77.

UTAH:

Constitution Art. I, secs. 7-13.

Utah Code, Criminal Proc. Titles 105-1-8, 105-22-12, provides that if the defendant appears for arraignment without counsel, he must be informed by the court that it is his right to have counsel before being arraigned, and must be asked whether he desires the aid of counsel. If he desires, but is unable to employ counsel, the court must assign counsel to defend him. This applies in capital and non-capital cases alike. However, the accused may waive this right by conduct and action at the time of his trial. *State* v. *Mewhinney*, 43 U. 135, 134 P. 632; *State* v. *Aikers*, 87 U. 507, 51 P. (2d) 1052.

VERMONT:

Constitution, Ch. I, Art. 10.

General Laws, Ch. 101, sec. 2327, provides that a person accused has a right to be heard by himself and his counsel.

There are no Vermont cases interpreting directly the court's duty under the statute and the extent of its discretion in refusing to appoint counsel.

However, General Laws, Ch. 101, sec. 2370, provides for the compensation of counsel assigned to defend a respondent in certain criminal cases. The court's duties to assign counsel are not set out under the provision or any other provision pertaining to the appointment of counsel for an indigent accused anywhere in the General Laws.

In the case of *State* v. *Gomez*, 89 Vt. 490, the court, in

discussing an accused's rights under section 2370, held that under this section the court within its discretion may refuse to assign counsel if the court believes the defendant has means.

VIRGINIA:

There is no specific provision in the Virginia Constitution guaranteeing the person accused of crime the right to have assistance of counsel. But the Virginia courts hold that it is a right guaranteed to accused under their Bill of Rights, sec. 8, Constitution of Virginia. *Barnes* v. *Virginia*, 92 Va. 794, 23 S. E. 784.

It is the Virginia law that courts of record with criminal jurisdiction possess the inherent power to appoint counsel to defend paupers and other indigent persons charged with crime. *Watkins* v. *Commonwealth*, 174 Va. 518.

A waiver of the right to counsel is implied where the accused appears without counsel and fails to request that counsel be appointed. *Wilkinson* v. *Youell*, 180 Va. 321, 23 S. E. (2d) 356.

WASHINGTON:

Remington Revised Stats. of Washington, Criminal Code, Title 13, Ch. 16, sec. 2095, provides:

> "If the defendant appear without counsel he shall be informed by the court that it is his right to have counsel before being arraigned and he shall be asked if he desire the aid of counsel, and if it appear that he is unable to employ counsel, by reason of poverty, counsel shall be assigned him by the court."

Section 2305 provides:

> "Whenever a defendant shall be arraigned upon the charge that he has committed any felony and shall request the court to appoint counsel to assist in his

defense and shall by his oath or such other proof as may be required to satisfy the court that he is unable by reason of poverty to procure counsel, the court shall appoint counsel, not exceeding two, for such defendants, to be paid • • •."

The Washington courts have upheld a conviction of a felony upon a plea of guilty made without the advice of counsel where it did not affirmatively appear of record that the defendant was advised of his right to counsel. *State* v. *Schofield*, 129 Wash. 295.

WEST VIRGINIA:

Constitution, Art. III, sec. 14, provides that in criminal trials the accused "shall have the assistance of counsel."

The West Virginia courts have held that the right to have counsel is a mere privilege guaranteed by the Constitution. If it differs in nature as well as in form from the guaranty of a trial by jury, the latter is prohibitory in form, while the other is permissive and conditional on the pleasure of the accused. No invasion of this guaranty is disclosed, therefore, unless a request for the assistance of counsel appears by the record to have been denied by the court, right to counsel may be waived or renounced and it is not denied by a mere failure to assign counsel. *State* v. *Yoes*, 67 W. Va. 546, citing *People* v. *Schinger*, 102 Ill. 241.

WISCONSIN:

Wisconsin Constitution, Art. I, sec. 7, guarantees the right to counsel to an accused.

Chapter 448, Laws of 1942, section 357.26, Stats. provides that a court may appoint counsel for an indigent accused. Paragraph 2 of this statute provides:

"Upon arraignment and before plea of any person charged with a felony he shall be advised by this court

of his right to counsel and a record shall be made of such advice upon the minutes of the court or in a transcript of the proceedings."

The Supreme Court of Wisconsin has held that even in the face of such provisions of the Wisconsin statutes an accused is not entitled to his release (in *habeas corpus* based on the claim that he was denied due process of law because he was not advised of his right to counsel prior to his plea of guilty as provided in the above cited statute. The court held that the petitioner should aver the following matters: (1) whether he knew he was entitled to the benefit of counsel, and if so, why he did not request the court to appoint counsel; (2) whether he made any effort to procure counsel and if he did not do so, the reason for his failure; (3) whether he was capable of making his own defense; (4) whether he was denied the right to confer with persons other than inmates of the place where he was confined; and (5) whether he knew the consequences of his plea of guilty. *State ex rel. Doxtater* v. *Murphy*, 248 Wisc. 593.

WYOMING:-

Constitution, Art. I, sec. 10, provides that the accused shall be granted the right to counsel in a criminal case.

Wyoming Compiled Stats. 1945, Art. VIII, sec. 10-805, provides that if an accused be without counsel or unable to employ any, "it shall be the duty of the court to assign him counsel at his request * * *."

The right or privilege to defend by counsel as guaranteed by the Constitution, Art. I, sec. 10, may be waived or renounced and it is not denied by a mere failure to assign counsel, there being no invasion of it disclosed unless it appears by the record that a request for assignment of counsel was denied by the court. *James* v. *State*, 27 Wyo. 378, 196 P. 1045.

FILE COPY

In the Supreme Court of the United States

October Term 1946

No. 540

Nelson Foster and George Payne,
Petitioners,

v.

The People of the State of Illinois,
Respondent.

On writ of certiorari to the Supreme Court of the State of Illinois.

BRIEF FOR THE STATE OF MICHIGAN, AS AMICUS CURIAE.

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In the Supreme Court of the United States

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No. 540

Nelson Foster and George Payne,
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The People of the State of Illinois,
Respondent.

On writ of certiorari to the Supreme Court of the State of Illinois.

Brief for the State of Michigan, as Amicus Curiae. [*]

I

Statement of the Case.

The decision to file a brief in this cause was influenced somewhat, though not entirely, by our apprehension that a further judicial step toward adoption of an unqualified rule (*viz.*, that due process is denied by a State whenever it permits a layman, regardless of age, mentality, or ability to make a competent choice, to plead guilty without the advice of counsel), [1] would lead inevitably to

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[*] In filing this brief, we exercise the privilege of Revised Rule 27, § 9.

[1] The Court has refused, so far, to hold that 'the Constitution unqualifiedly deems an accused incompetent unless he does have the advice of counsel'. Adams v. United States, ex rel. McCann, 317 U.S. 269, at 277.

a jail delivery of hundreds of prisoners whose release might endanger the welfare of organized society; for as we view the problem, the firm establishment of such a broad rule could only result in freeing numerous criminals of a desperate type who many years ago pleaded guilty without entertaining the slightest notion that they were in need of counsel (cases in which all witnesses have disappeared). [2]

We accept respondent's statement of the case and counsel's version of the questions presented; and we are in full accord with the views expressed by the Attorney General of Illinois.

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[2]

To us the important question is whether Michigan courts are obligated to go much beyond the doctrine reasserted in De Meerleer v. Michigan, 329 U.S. ——; 67 Sup. Ct. 596. See also Willey v. Hudspeth (March 8, 1947), 178 P. 2d 246, a Kansas case involving a 17-year old boy.

II

Argument.

Point One

Federal due process does not imply a categorial right to counsel in non-capital cases. Special circumstances, such as a more than ordinarily complex case or a less than ordinarily understanding accused, must exist in order to warrant invocation of the Fourteenth Amendment.

Apt and incisive language of the Court in the case of *Adams,* [3] lends further color to the convincing argument of the Attorney General of Illinois:

> "The task of judging the competence of a particular accused cannot be escaped by announcing delusively simple rules of trial procedure which judges must mechanically follow. The question in each case is whether the accused was competent to exercise an intelligent, informed judgment—and for determination of this question it is of course relevant whether he had the advice of counsel. *But it is quite another matter to suggest that the Constitution unqualifiedly deems an accused incompetent unless he does have the advice of counsel.*" [Emphasis added].

Counsel for the State of Illinois have through exhaustive and painstaking research prepared and published as an appendix to their brief (pp. 20-46), a study of the right

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[3] Counsel for petitioners relies upon this case, and the Attorney General of Illinois quotes from another part of the opinion. Adams v. United States ex rel. McCann, 317 U.S. 269, at 276-277.

to counsel in state criminal cases (a continuation of this Court's work in *Betts v. Brady*, 316 U.S. 455, 477-480).

From this valuable little treatise, we learn that decisions of courts of last resort in the majority of states hold or state (1) that a failure to request counsel operates as a waiver of the right to counsel, [4] or (2) that there is a waiver of the right to counsel where the defendant pleads guilty to a non-capital offense and fails to request counsel. [5] And the Attorney General sets forth his collation of constitutional and statutory provisions of the various states relating to right of counsel (brief, pp. 22-46).

Michigan's Constitution, article 2, § 19, guarantees that 'in every criminal prosecution, the accused shall have the right . . . to have the assistance of counsel for his defense', and that declaration is not a recent innovation in our fundamental law.

> "In practically identical language it was a part of the first Michigan State Constitution (1835), art. 1, § 10, and was carried down into the Constitution of 1908 through article 6, § 28, of the Michigan Constitution of 1850. Also, before Michigan became a State, the right of an accused person to have counsel

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[4] Prior to De Meerleer, supra, decisions of the Michigan supreme court, even in murder cases, People v. Crandell, 270 Mich. 124, fell within this category; but the court has not perforce De Meerleer, felt called upon to overrule People v. Harris, 286 Mich. 317, where forgery was charged, or In re Elliott, 315 Mich. 662, where robbery while armed was involved. See also, People v. Haddad, 306 Mich. 556.

[5] Citing: People v. Fries, 294 Mich. 382, involving plea of guilty to charge of carrying concealed weapons.

was recognized by the territorial laws applicable to this territory, adopted by the governor and judges of the Territory of Michigan." [6]

The legislature of this State has fortified the constitutional guarantee by a statutory declaration, [7] and it has provided for the appointment of 'some attorney to conduct the defense', at county expense, 'whenever any person charged with having committed any felony or misdemeanor shall be unable to procure counsel'. [8]

'Thus', as the Attorney General of Illinois so clearly notes, 'the courts of at least one-half of the states of the Union have not regarded the right to counsel, at least in non-capital cases where there is an acknowledgment of guilt in open court, as implicit in the concept of due process of law'.

And we also agree with him when he says:

"This case cannot be reversed on the common-law record alone unless this Court is prepared to hold that in *every* serious criminal case, the trial court must appoint counsel for the accused before receiving a

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[6]

The court through Mr. Justice Boyles, In re Elliott, 315 Mich. 662, at 666, citing inter alia 1 Michigan Territorial Laws, p. 595, § 22 of 'An Act regulating proceedings in criminal cases', enacted by the governor and judges, May 11, 1820.

[7]

Mich. Code of Criminal Procedure, chap. 37, § 1 (3 Comp. Laws Mich. 1929, § 17129 [Mich. Stat Ann. § 28.854]).

[8]

Idem., chap. 15, § 16 (3 Comp. Laws Mich. 1929, § 17486 [Mich. Stat. Ann. § 28.1253]).

plea of guilty or to recite affirmatively a waiver of the right'' (brief, p. 9).

Respondent's counsel then point out dire results which might follow this Court's declaration of such a principle (brief, pp. 9-10), and, while we agree, we desire to speak more particularly of the conditions that could in such an event arise in our own State.

While Michigan has for well over a century preserved the right to counsel for the purpose of defense, she has never, in ordinary or, what for lack of a better term might be called 'mine-run' criminal cases, where extraordinary circumstances are absent, considered it necessary to furnish counsel for an accused person unless requested. Indeed, it would be extremely difficult to persuade a Michigan *nisi prius* judge to accept the idea that counsel should be tendered an accused person of mature years, of more than average intelligence, and of sufficient mentality to know that he has committed an act proscribed by state law (such as larceny, robbery, burglary, or robbery), who comes voluntarily into open court without coercion or intimidation of any kind, and expresses a desire to plead guilty to an uncomplicated charge. Much less could he grasp the thought that such a criminal should be given his freedom some 15 years after pleading guilty, and after the witnesses are dead, or have otherwise vanished. [9]

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[9]

This does not mean that Michigan judges have not accepted the De Meerleer doctrine, for several new trials have been granted on that authority, but it does mean that judicial officers of this State are deeply concerned lest that principle be carried so far that it will reach all criminals incarcerated in this state without having first sought counsel before pleading guilty.

The Attorney General of Illinois draws a clear line of demarcation between the non-capital cases on which petitioners rely, [10] and the case at bar, and, while we need not repeat what he has said so well, we take the liberty of noting the distinctive features of the case of *De Meerleer, supra.*

In *De Meerleer,* a 17-year old boy, accused of murder, was held in communicado for several days. He was then taken before a magistrate to waive preliminary examination, and rushed into the trial court where, within a few hours, without the advice of counsel or a chance to obtain a lawyer, he pleaded guilty, was accorded a unilateral hearing to determine the degree of the crime, without opportunity to cross-examine the State's witnesses, to produce witnesses of his own, or to testify in his own behalf, and he was sentenced to imprisonment for life (although his father was present in the court room and protested). Moreover, the record did not disclose that the defendant's plea was unequivocal; and his conduct in open court on arraignment was that of a bewildered youth who could not comprehend the fine distinctions between first and second degree murder. [11]

The supreme court of Kansas, in a recent case, [12] set aside a conviction on a plea of guilty entered by a 17-year old boy in circumstances closely paralleling *De Meer-*

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[10]

House v. Mayo, 324 U.S. 42; Rice v. Olson, 324 U.S. 786; Canizio v. New York, 327 U.S. 82.

[11]

Mich. Penal Code, § 316 (5 Comp. Laws Mich., 1940 Cum. Supp., § 17115-316 [Mich. Stat. Ann. § 28.548]).

[12]

Willey v. Hudspeth (Kans., March 7, 1947), 178 P 2d 246.

leer, but they went even further than this Court in the case of *De Meerleer*, holding (1) that a 17-year old boy ordinarily is not possessed of sufficient comprehension of his constitutional rights in a criminal case in which he is charged with the commission of a felony to waive advice of counsel and should be given the benefit of consultation with counsel before he is permitted to enter a plea of guilty; and (2) that the failure of the trial court to require petitioner to consult with counsel caused the trial court to lose jurisdiction to accept the plea of guilty and the sentence imposed thereon, therefore, was void.

In the case at bar, however, outside a few extrajudicial assertions in petitioners' assignments of error, the record discloses no circumstances of the extraordinary nature found in the case of *De Meerleer* or in the Kansas decision just noted.

Point Two

Even if due process required the appointment of counsel in this case unless the accused chose to dispense therewith, the case could not be reversed on the common-law record on writ of error. Other remedies, original and not appellate in office and nature, are available in Illinois for the assertion of any rights that petitioners may have or claim.

We agree, of course, that the Attorney General of Illinois is absolutely correct in stating that under the laws of his State, petitioners' remedy is to present a simple motion to the trial court suggesting facts and circumstances that demonstrate, or at least raise a fair inference, of denial of due process. Such questions cannot be raised on a direct appeal from a naked common-law record.

This is in close harmony with Michigan law, for in this State the recognized procedure is to file a motion for leave to file a delayed motion for new trial, setting forth facts dehors the formal trial court record of calendar and journal entries. [13] And it should also be stated that in Michigan, *habeas corpus* is not deemed the appropriate remedy. [14]

Michigan realizes that only in her trial courts can adequate facilities be found to resolve those issues of fact which are bound to arise in a case of this type. [15]

Point Three

The record fails to show or to support a fair inference that the prisoners had 'special need for advice of counsel because of the difficult legal questions involved' or were 'unconstitutionally rushed through trial'.

The Attorney General of Illinois is far more competent than is the writer of this brief to comment upon the common-law record in this case; indeed, it would be extremely presumptuous on our part to undertake such a task.

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[13]

People v. Burnstein, 261 Mich. 534. And the procedure was followed in De Meerleer.

[14]

In re Palm, 255 Mich. 632; In re Brasel, 283 Mich. 632; In re Stone, 295 Mich. 207; In re Dunning, 310 Mich. 1.

[15]

We might add it is the policy of this department, whenever a problem of this nature arises, to conduct a thorough investigation in the trial court and, if constitutional rights have been violated, suggest that a new trial be granted.

It is our thought, however, that this naked common-law record fails to reveal any special circumstances entitling the petitioners to consideration, that the cases cited by the respondent's counsel control, and that *Carter v Illinois*, 329 U.S. 173, applies.

III

Conclusion.

For the reasons developed in the brief of the Attorney General of Illinois, it is submitted that the judgment of the Supreme Court of that State should be affirmed.

Respectfully submitted,

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Attorney General of the State of Michigan.

Edmund E. Shepherd
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Assistant Attorney General.

Counsel for the State of Michigan, as amicus curiae.

No 540

In The

Supreme Court of the United States

October Term, 1946

NELSON FOSTER AND GEORGE PAYNE, Petitioners

v.

THE PEOPLE OF THE STATE OF ILLINOIS, Respondent

BRIEF FOR THE STATE OF VERMONT AS AMICUS CURIAE

On writ of Certiorari to the Supreme Court of the State of Illinois

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No. 540

In The

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Petitioners,

v.

THE PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

On writ of Certiorari to the Supreme Court
of the State of Illinois

BRIEF FOR THE STATE OF VERMONT AS AMICUS CURIAE

The following brief is submitted by the State of Vermont, amicus curiae, for the purpose of presenting the circumstances and precedents now in effect within this state as the same relate to the question in this cause involved The brief is filed under the provisions of Par. 9, Rule 27, of the Rules of the Supreme Court of the United States.

The question presented may be summarized as follows:

> Are prisoners who have pleaded guilty to such non-capital offenses as burglary, larceny, robbery and the like entitled to their release many years after their conviction, upon the ground that the record fails to show the appointment of counsel and is silent as to whether the accused requested counsel?

Article 10th, Chapter I, Constitution of Vermont, to the extent here material, provides:

> "That in all prosecutions for criminal offenses, a person hath a right to be heard by himself and his counsel * * *."

This provision has been construed as permitting the respondent to be represented and heard by counsel but not to impose a duty on the court to assign counsel at the State's expense.

State v. Gomez, 89 Vt. 490, 496, 497, 96 Atl. 190.

The Vermont statute provides:

> "Compensation shall not be paid by the state to counsel assigned to defend a respondent in a criminal proceeding, except to counsel assigned by the county court in capital causes or in causes where the punishment is by imprisonment in the state prison * * *."

Sec. 2370, Public Laws of Vermont, (1933); Sec. 2539, General Laws of Vermont, (1917); Sec. 2261, Public Statutes of Vermont, (1906); Sec. 1900, Vermont Statutes, (1894); Sec. 1636, Revised Laws of Vermont, (1880).

In connection with a claim for counsel by a respondent under the provisions of the foregoing section, it was held that: "There is no statute which imposes a duty on the court to assign counsel at the State's expense under any conditions."

State v. Gomez, supra, p. 496.

The Vermont statute relating to appointment of counsel and the constitutional provision in substantially

their present form, have existed since the earliest days of this State. The case of **State v. Gomez**, supra, is the only instance where the effect of either provision has been challenged in the Supreme Court of the State, and the decision in that case has become the settled law of the State for more than thirty years. The appointment of counsel has not been considered a right essential to a fair trial at any time and such relief as has been effected by statute has consistently been deemed a matter of legislative policy.

A large percentage of criminal causes involving the more serious offenses disclose proceedings allowing assignment of counsel for the respondent at the expense of the State but many instances doubtless have occurred where no request for counsel was made, no action taken by the court for assignment, and no reference or statement made in the record of the case as to such facts. To determine a violation of the due process clause incorporated in the Fourteenth Amendment of the national Constitution because of the failure of the record in such a criminal cause to show proceedings not heretofore required, as asserted by the petitioners, is to extend the restraint upon national courts laid down by the Sixth Amendment to an entirely new field, and is contrary to the established will of the people of this State as expressed in their legislative acts and the determinations of their courts. Such determination, in effect, will entitle criminals now confined as punishment for the more serious offenses to release in those instances where the record indicates pleas of guilty without the appointment of counsel, even though such record be in full compliance with all statutes and judicial precedents effective at the time of record and in accord with principles recognized over the years. It is respectfully submitted that such result would be contrary to the common and judicial intent and understanding relative to the rights of a respondent to procure counsel in his behalf, which has been given effect and established as the law of Vermont since its earliest days. Such established rule has

not been inconsistent with that now set forth by this Honorable Court to the effect that due process, within the concept applied to that term as incorporated in the Fourteenth Amendment, does not obligate the State to furnish counsel to the respondent in every such case.

Betts v. Brady (1941) 316 U. S. 455, 86 L. Ed. 1595, 62 S. Ct. 1252.

The State of Vermont refers to and concurs in the brief in this cause filed in behalf of The People of the State of Illinois, and respectfully requests that this Honorable Court, on the basis of authorities and reasons therein set forth, determine that the petitioners in this cause were not deprived of any fundamental right to counsel guaranteed by the Fourteenth Amendment to the Constitution as an integral part of due process of law.

Respectfully submitted,

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Counsel

CLIFTON G. PARKER,
Attorney General

SUPREME COURT OF THE UNITED STATES

No. 540.—October Term, 1946.

Nelson Foster and George Payne, Petitioners, *v.* The People of the State of Illinois.	On Writ of Certiorari to the Supreme Court of the State of Illinois.

[June 23, 1947.]

Mr. Justice Frankfurter delivered the opinion of the Court.

This is an original proceeding in the Supreme Court of Illinois by way of writ of error to test the validity of sentences of imprisonment following pleas of guilty. The Supreme Court of Illinois having denied the writ, 394 Ill. 194, we brought the case here, 329 U. S. 712, because of the importance of reviewing convictions where solid doubt is raised whether the requirements of due process have been observed.

On February 22, 1935, the petitioners were sentenced to confinement in the Illinois State Penitentiary, under the Illinois State indeterminate sentence law, after pleading guilty to an indictment charging them with burglary and larceny. Cahill's Ill. Rev. Stats. (1933) c. 38, §§ 65, 796. Since the controversy turns on the legal significance of the circumstances under which the pleas of guilty were accepted, it is important to state them according to the record which, for purposes of this proceeding, is binding upon the Illinois Supreme Court and therefore upon this Court. According to the "Minutes from the Judges Docket," the defendants Foster and Payne (petitioners here)

> "having been furnished with a copy of the Indictment and a list of the Jurors and Peoples Witnesses and are advised of their rights of Trial and of the

consequences of an entry of a plea of guilty and being arraigned in open Court for plea to the Indictment says, each for himself That he is guilty of burglary and larceny as charged in the indictment and thereupon the Court advises and admonishes each of said defendants of the consequences of entering such pleas of guilty, and Thereafter each of said defendants still persist in such pleas of guilty . . . Whereupon said pleas of guilty are received and entered of record."

"The Court finds the ages of said defendants to be as follows, respectively, Nelson Foster 34 years old, George Payne, alias [redacted]h Jefferson 48 years . . ."

Eleven years later, on February 7, 1946, the petitioners asked the Supreme Court of Illinois for their discharge. Various state grounds were urged and rejected. Our sole concern is with the claim "that the record in this case fails to show" a compliance with the Fourteenth Amendment insofar as the Due Process Clause of that Amendment requires an accused to have the benefit of counsel.

The considerations that guide the disposition of this case have been canvassed here in a series of recent opinions. The "due process of law" which the Fourteenth Amendment exacts from the States is a conception of fundamental justice. See *Hebert* v. *Louisiana*, 272 U. S. 312, 316; *Palko* v. *Connecticut*, 302 U. S. 319, 325. It is not satisfied by merely formal procedural correctness, nor is it confined by any absolute rule such as that which the Sixth Amendment contains in securing to an accused "the Assistance of Counsel for his defence." By virtue of that provision, counsel must be furnished to an indigent defendant prosecuted in a federal court in every case, whatever the circumstances. See *Palko* v. *Connecticut*, *supra*, at 327; *Johnson* v. *Zerbst*, 304 U. S. 458; *Betts* v. *Brady*, 316 U. S. 455, 464-65. Prosecutions in State courts are

not subject to this fixed requirement. So we have held upon fullest consideration. *Betts* v. *Brady, supra.* But process of law in order to be "due" does require that a State give a defendant ample opportunity to meet an accusation. And so, in the circumstances of a "particular situation," assignment of counsel may be "essential to the substance of a hearing" as part of the due process which the Fourteenth Amendment exacts from a State which imposes sentence. *Palko* v. *Connecticut, supra,* at 327. Such need may exist whether an accused contests a charge against him or pleads guilty.

The rationale of this application of due process was first expounded in *Powell* v. *Alabama,* 287 U. S. 45. In following that case our recent decisions have spoken of "the rule of *Powell* v. *Alabama,*" or "the requirements of *Powell* v. *Alabama,*" thereby indicating the essential scope of the doctrine. See *Williams* v. *Kaiser,* 323 U. S. 471, 476–77; *Tomkins* v. *Missouri,* 323 U. S. 485, 488. And so, in every case in which this doctrine was invoked and due process was found wanting, the prisoner sustained the burden of proving, or was prepared to prove but was denied opportunity, that for want of benefit of counsel an ingredient of unfairness actively operated in the process that resulted in his confinement. See *Powell* v. *Alabama, supra,* at 51, 53, 56, 57–58; *Smith* v. *O'Grady,* 312 U. S. 329, 334; *Williams* v. *Kaiser, supra,* at 472, 473–74, and 476–77; *Tomkins* v. *Missouri, supra,* at 486–487; *House* v. *Mayo,* 324 U. S. 42, 45–46; *White* v. *Ragen,* 324 U. S. 760, 762–63; *Rice* v. *Olson,* 324 U. S. 786, 788–89. Only the other day, in a case concerning a charge of first-degree murder against a seventeen-year old defendant, in which we found a deprivation "of rights essential to a fair hearing," we took pains to point out that "The court did not explain the consequences of the plea of guilty, and the record indicates considerable confusion in petitioner's mind at the time of the arraignment as to the effect of

such a plea." *De Meerleer* v. *Michigan*, 329 U. S. 663, 664.

In this case there is neither proof nor uncontradicted allegation of any such miscarriage of justice in accepting pleas of guilty. The record of the proceeding plainly imports an observance of due process. In the contemporaneous language of the trial court, the defendants "are advised of their rights of Trial and of the consequences of an entry of a plea of guilty," the court "advises and admonishes each of said defendants of the consequences of entering such pleas of guilty," and the defendants thereafter still persisting, their pleas "are received and entered of record." There was nothing in the common-law record, on the basis of which the Supreme Court of Illinois rendered its decision, to contradict this account of the proceedings in 1935. We thus have in effect the bald claim that, merely because the record does not disclose an offer of counsel to a defendant upon a plea of guilty, although the court before accepting the plea duly advised him of his "rights of Trial" and of the consequences of such a plea, he is "deprived of rights essential to a fair hearing under the Federal Constitution." *De Meerleer* v. *Michigan*, *supra*, at 665.

We reject such a claim. Most incarcerations are upon pleas of guilty, and probably most such pleas have been made without the felt need of counsel. It is not for us to suggest that it might be desirable to offer to every accused who desires to plead guilty the opportunities for counsel and to enter with formality upon the record the deliberate disclaimer of his need for counsel because of a full appreciation of the meaning of a plea of guilty as expounded by responsible judges. Our duty does not go beyond safeguarding "rights essential to a fair hearing" by the States. After all, due process, "itself a historical product," *Jackman* v. *Rosenbaum Co.*, 260 U. S. 22, 31, is not to be turned into a destructive dogma

in the administration of systems of criminal justice under which the States have lived not only before the Fourteenth Amendment but for the eighty years since its adoption. It does not militate against respect for the deeply rooted systems of criminal justice in the States that such an abrupt innovation as recognition of the constitutional claim here made implies, would furnish opportunities hitherto uncontemplated for opening wide the prison doors of the land.

Insofar as the sentences in this case are attacked on claims which were not open for consideration on the common-law record which alone was before the Illinois court, see 394 Ill. 194, they are not open here. *Carter* v. *Illinois*, 329 U. S. 173. They must be raised by whatever procedure Illinois may provide, or, in default of relief by appropriate Illinois proceedings, by a new claim of denial of due process for want of such relief. See *Mooney* v. *Holohan*, 294 U. S. 103.

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 540.—October Term, 1946.

Nelson Foster and George Payne, Petitioners, v. The People of the State of Illinois.	On Writ of Certiorari to the Supreme Court of the State of Illinois.

[June 23, 1947.]

Mr. Justice Black, with whom Mr. Justice Douglas, Mr. Justice Murphy and Mr. Justice Rutledge join, dissenting.

In *Adamson* v. *California*, this day decided, *ante* p. —, the Court waters down the Fourteenth Amendment's application to the states of the Bill of Rights guarantee against self-incrimination so as to make it compatible with the Court's standards of decency and a fair trial. In this case the Court similarly waters down the Bill of Rights guarantee of counsel in criminal cases. In both cases, the Court refuses to strike down convictions obtained in disregard of Bill of Rights guarantees, assuming all the while that identical convictions obtained in federal courts would violate the Bill of Rights. For the Court, in the instant case, concedes that, by virtue of the Sixth Amendment, "counsel must be furnished an indigent defendant in every case whatever the circumstances." This, of course, relates to convictions following both pleas of not guilty and pleas of guilty. *Williams* v. *Kaiser*, 323 U. S. 471; *Tomkins* v. *Missouri*, 323 U. S. 485.

In the *Adamson* case, I have voiced my objections to dilution of constitutional protections against self-incrimination in state courts. This decision is another example of the consequences which can be produced by substitution of this Court's day-to-day opinion of what kind of trial is fair and decent for the kind of trial which the Bill of

Rights guarantees. This time it is the right of counsel. We cannot know what Bill of Rights provision will next be attenuated by the Court. We can at least be sure that there will be more, so long as the Court adheres to the doctrine of this and the *Adamson* case.

The Court's decision relies heavily on *Betts* v. *Brady*, 316 U. S. 455. In that case, a man on relief, too poor to hire a lawyer, and whose request for the appointment of a lawyer was denied, was compelled to act as his own lawyer on a charge of robbery. Conviction followed. That case is precedent for this one. But it is the kind of precedent that I had hoped this Court would not perpetuate.

One thing more. The Court seems to fear that protecting these defendants' right to counsel to the full extent defined in the Bill of Rights would furnish "opportunities hitherto uncontemplated for opening wide the prison doors of the land," because, presumably, there are many people like Betts, Foster and Payne behind those doors after trials without having had the benefit of counsel. I do not believe that such a reason is even relevant to a determination that we should decline to enforce the Bill of Rights.

SUPREME COURT OF THE UNITED STATES

No. 540.—October Term, 1946.

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[June 23, 1947.]

Mr. Justice Rutledge, with whom Mr. Justice Black, Mr. Justice Douglas, and Mr. Justice Murphy concur, dissenting.

I think the Sixth Amendment's guaranty of the right to counsel in criminal causes is applicable to such proceedings as this in state courts.

Apart from that view and upon the Court's basis that the Fourteenth Amendment by its own force independently prescribes a partial similar guaranty, cf. *Palko* v. *Connecticut*, 302 U. S. 319, 327; *Betts* v. *Brady*, 316 U. S. 455; *Powell* v. *Alabama*, 287 U. S. 45, I am unable to accept its conclusion in this case. Of course if the so-called presumption of regularity is to be effective to sustain the denial of counsel in circumstances as bald as those presented in *Gayes* v. *New York*, 331 U. S. —, decided today, that presumption must work the same denial in the somewhat less startling f cts of this case.

But when a record discloses as much as the record here shows, I do not think any presumption of regularity should be permitted to overcome the substance of the violated constitutional right. Such a presumption indeed, if valid by mere force of the fact that a judgment has been rendered, may always be indulged. Cf. *Williams* v. *Kaiser*, 323 U. S. 471; *Tomkins* v. *Missouri*, 323 U. S. 485; *De Meerleer* v. *Michigan*, 330 U. S. —. And the consequences of such a course of action here, for the observance and preservation of constitutional rights,

more especially of the indigent and ignorant who are unable to employ counsel from their own resources and do not know their rights, must be, not merely a denial of the basic right of counsel, but also a denial of the equal protection of the laws in sweeping application. Poverty or wealth will make all the difference in securing the substance or only the shadow of constitutional protections.

Here petitioners were charged with the serious crimes of burglary and larceny, handed a copy of the indictment, and arraigned. Every lawyer knows the difficulties of pleading to such charges, including the technicalities of the applicable statutes and especially of the practice relating to included or lesser offenses. The crimes charged involved penalties of imprisonment for from one year to life, the penalty actually imposed upon these petitioners.

On the very day the indictment was handed down, petitioners were arraigned, their pleas of guilty were accepted, and they were sentenced. At no time were they offered counsel or advised of their right to counsel, nor did they receive any assistance from counsel. The record, it is true, recites that they were "advised of their rights of Trial and of the consequences of an entry of a plea of guilty," notwithstanding which each said that he was guilty, whereupon the court "advises and admonishes each of said defendants of the consequences of entering such pleas of guilty," despite which each persisted in his plea.

However this vague and formal recital might be taken in other circumstances, it cannot be regarded in this case as meaning that petitioners were either offered counsel or informed of any right to counsel. Indeed the recital must be taken as having deliberately avoided including statements in either respect. And, upon the record as a whole, we are required not only to read it in this light but to conclude that the recital and the intentional omission of statements concerning the right to counsel

were effective to establish that the petitioners were in fact denied that right.

The Court does not point out, but it is the very heart of this case, that under Illinois law these petitioners were, in effect, denied the right to have counsel tendered or appointed by the court. It was under no duty imposed by state law to tender counsel, to inquire into the need for counsel, or to inform the defendants of any right to counsel. Indeed, under the law of the state, it seems, the court would have exceeded its powers by taking action in any of these respects.

We are not only entitled, we are required, to read the record of the state's proceedings in the light of the state's law applicable to them. In Illinois by statute it is only in capital cases that the court is under an affirmative duty, when it appears that a defendant is indigent, to tender appointment of counsel.[1] In noncapital cases the following statute applies:

> ". . . Every person charged with crime shall be allowed counsel, and when he shall state upon oath that he is unable to procure counsel, the court shall assign him competent counsel, who shall conduct his defense." Ill. Rev. Stat. (1945) c. 38, par. 730.

The Illinois Supreme Court consistently has construed this statute as requiring appointment of counsel only when a defendant requests counsel and states on oath that he cannot procure counsel. It is expressly held that the provision "does not place upon the Court the duty to proffer the services of counsel . . .," *People* v. *Lavendowski*, 326 Ill. 173, 176, nor does it require advising

[1] "Whenever it shall appear to the court that a defendant or defendants indicted in a capital case, is or are indigent and unable to pay counsel for his or her defense, it shall be the duty of the court to appoint one or more competent counsel for said defendant or defendants, who shall receive a reasonable sum for services . . . ." Ill. Rev. Stat. (1945) c. 38, par. 730.

defendants of their right to counsel. *People* v. *Carrie*, 387 Ill. 587, 589–590. See also *People* v. *Corbett*, 387 Ill. 41; *People* v. *Childers*, 386 Ill. 312; *People* v. *Fuhs*, 390 Ill. 67. And the failure of the defendant to state his need and inability to procure counsel under oath is taken apparently as a waiver of the right. Cf. *People* v. *Stubblefield*, 391 Ill. 609, 610.[2]

Finally, the opinion of the Illinois court in this case shows that petitioners were denied relief on the basis of these rules.[3]

In the light of the Illinois statutes and decisions, therefore, the present record can be taken to sustain no presumption that the trial court offered counsel to petitioners, inquired concerning their need for counsel or ability to secure such aid, or advised them in any way of their right to have that assistance. The only tenable presumption is that the court refrained deliberately, in accordance with the state law, from taking action in any of these respects.

Moreover, when men appear in court for trial or plea, obviously without counsel or so far as appears the means of securing such aid, under serious charges such as were made here involving penalties of the character imposed, it is altogether inconsistent with their federal constitutional right for the court to shut its eyes to their apparently helpless condition without so much as an inquiry concerning its cause. A system so callous of the rights of men, not only in their personal freedom but in their rights

[2] And see note 3.

[3] "It is first contended by plaintiffs in error that they did not have counsel appointed to represent and protect their rights. It is not shown by the record that the defendants informed the court or in any way indicated that they desired counsel. We have repeatedly held that the right to be represented by counsel is a personal right which a defendant may waive or claim as he himself may determine. (*People* v. *Fuhs*, 390 Ill. 67.) This contention is without merit." 394 Ill. 194, 195.

to trial comporting with any conception of fairness, as to tolerate such action, is in my opinion wholly contrary to the scheme of things the nation's charter establishes. Courts and judges, under that plan, owe something more than the negative duty to sit silent and blind while men go on their way to prison, for all that appears, for want of any hint of their rights.

Adding to this blindness a "presumption of regularity" to sustain what has thus been done makes a mockery of judicial proceedings in any sense of the administration of justice and a snare and a delusion of constitutional rights for all unable to pay the cost of securing their observance.